93-645

Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

IN RE: THEODORE V. and SANDRA A. OLSON,
Debtors.

UNITED STATES OF AMERICA,

Plaintiff-Respondent,
v.
THEODORE V. and SANDRA A. OLSON,
Defendants-Respondents,
v.
WILLIAM L. NEEDLER and FRANK HEINISCH,
Petitioners.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the courts below have misconstrued the Nebraska Lien Statute and whether the Olson Attorneys have a lien on debtor's corn fund thereunder.

2. Whether the courts below have misconstrued the Nebraska "Common Fund Doctrine" and whether the Olson attorneys have an equitable lien on debtor's corn fund.

3. Whether perfection of the Olson attorneys' judgment lien, prevented by the automatic stay of the bankruptcy, is an equitable reason to grant the Olson Attorneys a lien on debtor's corn fund.

4. Whether the Olsons are entitled to a first priority administrative claim in the second Chapter 11 proceeding, and if not, whether this is an additional equitable reason to grant the Olson Attorneys a lien on debtor's corn fund.

LIST OF PARTIES

The parties to this actions are as follows:

The Petitioners are Frank Heinisch, Attorney at Law, Law Offices of Frank Heinisch, P.O. Box 311, Geneva, NE 68361 and William Needler, Attorney at Law, William L. Needler & Associates, Ltd., Box 177, 106 W. 1st Street, Ogallala, NE 69153; also 1430 Ridge Road, Northbrook, IL 60062.

The Debtor Respondents herein are: Theodore V. and Sandra A. Olson, Box 758, Atkinson, NE 68173. The Debtor Respondents' attorney is Robert Creager, Attorney, P.O. Box 4554, Lincoln, NE 68504.

The Respondent Internal Revenue Service of the United States, Washington, D.C., is represented by Robert D. Metcalfe, Trial Attorney, Tax Division, U.S. Department of Justice, P.O. Box 685,

Ben Franklin Station, Washington, D.C. 20044.

An interested party is Prudential Insurance Company, 1431 Opus Place, Suite 665, Downers Grove, IL 60515. Prudential is represented by Richard C. Anderl, Esq., The Omaha Building, Omaha NE 68102.

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PETITION FOR WRIT OF CERTIORARI
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The Petitioners, Attorneys William L. Needler and Frank Heinisch respectfully pray that a writ of certiorari issue to review the judgment and Opinion of the United States Court of Appeals for the Eighth Circuit entered on July 21, 1993,

which affirmed the courts below in their refusal to grant the petitioning attorneys, hereinafter called the "Olson attorneys" a lien for their fees on the proceeds of Debtor's 1982 corn crop.

OPINIONS BELOW

The July 21, 1993 opinion of the Court of Appeals for the Eighth Circuit is unreported at this time, but appears at A 1-21[1]. A petition for rehearing with suggestion for rehearing en banc was denied on September 1, 1993. (A 22).

The District Court Opinion, rendered on July 6, 1992, is not reported but appears here at A 23-36.

The bankruptcy court's Memorandum Opinion appears at 101 B.R. 134 (Bkrtcy. Neb. 1989) and here at A 37-120.

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[1]"A" stands for the Appendix to this Petition.

The bankruptcy court's journal entry appears at A 121-122.

Other opinions below in the case are reported as follows: In re Olson, 20 B. R. 206 (D. Neb. 1982); In re Olson, 21 B.R. 123 (Bkrtcy. Neb. 1982); In re Olson, 22 B.R. 473 (D. Neb. 1982); In re Olson, 36 B.R. 74 (D. Neb. 1982); In re Olson, 730 F. 2d 1109 (8th Cir. 1984); and In re Olson, 133 B. R. 1016 (D. Neb. 1991), adhered to and mod. on reconsideration (July 6, 1992 opinion and order of the District Court).

JURISDICTION

The bankruptcy court derives its jurisdiction by referral pursuant to 28 U.S.C., sec. 157. The district court derives its original jurisdiction of bankruptcy cases pursuant to 28 U.S.C., sec. 1334 and its appellate jurisdiction

from 28 U.S.C., sec. 158. The Court of Appeals gains its jurisdiction under 28 U.S.C., sec. 158. This Court's jurisdiction is under 28 U.S.C., sec. 1254(1).

STATUTES INVOLVED

The statute involved in this case, which awards an attorney's lien under Nebraska law on funds held by an adverse party in the action or proceeding in which the attorney was employed, is Nebraska Code, par. 7-108. The provision is quoted verbatim by all three courts below and appears at A 8, 31 and 76. The provision reads:

> An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party.

STATEMENT OF THE CASE

Most of the undisputed facts in this case are recounted by the bankruptcy court at 101 B.R. 136-140 (A 40-61), and because of their voluminous nature will not be repeated here. In sum, the bankruptcy court held as follows:

That the Olson Lawyers claim an interest in the fund escrowed by the debtor and others with the Overland National Bank of Grand Island because they performed necessary legal services which enabled the debtor to plant, maintain and harvest the debtor's 1982 corn crop, and that accordingly they should be compensated under the Nebraska Attorney's Lien Statute. The bankruptcy court held that the Lien Statute did not apply because the escrow agent was not an adverse party. It was conceded that "the

lawyers acted vigorously in both an offensive and defensive posture on behalf of the debtor . . ." The bankruptcy court specifically found at A 79:

> "The Court finds as a fact that the 1982 corn crop would not have been even planted by the debtor-in-possession but for the efforts of the lawyers. Prudential and other creditors fought the debtor at every turn. They attempted to prohibit the planting of the crop, to prohibit the obtaining of secured or unsecured credit to plant and maintain and harvest the crop. They moved to sequester rents and profits and they moved for relief from the automatic stay. They took action in the state courts to replevin the equipment which was necessary for the farm-

ing operation. The debtors, because of the legal efforts of the lawyers, were successful in producing a 1982 crop, paying the secured and unsecured suppliers and turning the crop into actual cash soon after harvest."

Nevertheless, the court ruled:

"However, no matter how hard they worked and no matter what they did, the lawyers did not obtain either a judgment or a settlement nor did they create a fund to which an attorneys' lien could attach." (A. 81).

The bankruptcy court also ruled that the Olson lawyers, the Appellants, did not have a perfected judgment lien against the fund because (i) the judgment runs against Theodore Olson and not

Sandra Olson and a good portion of the fund belongs to her, (ii) the Olson lawyers did not move further to perfect their judgment lien under state law, instead the Overland bank brought this declaratory judgment action to settle claims against the fund.

The bankruptcy court further held that, while the Olson Lawyers had a valid unsecured claim against Theodore Olson in the second Chapter 11 proceeding, they did not have a priority administrative claim. The court held that upon dismissal of the first case, the Olson Lawyers claim for fees simply became an unsecured claim against Theodore Olson.

In affirming the bankruptcy court, the District Court (A 23) held only (i) that the Overland bank was not an adverse

party so as to trigger the Nebraska Attorney's Lien Act and (ii) that it was not an abuse of discretion for the bankruptcy court, when considering the dismissal of the 1982 case to find, as a matter of fact, that the Olsons' Lawyers claim for fees became an unsecured claim against the estate.

In affirming the District Court (A 1, 20-1), the Court of Appeals concluded in its opinion of July 21, 1993:

> "In summary, under governing Nebraska law, the lawyers do not have an attorneys' lien since the facts do not bring their claims within the purview of the statute in question. They are not entitled to an equitable lien under the "common fund doctrine" since the proof did not establish that the lawyers

"created" the fund on which the lien was claimed. At best. the lawyers demonstrated that their legal services facilitated the growing of the crop which resulted in the creation of the fund. The facts therefore do not bring the claim within the purview of the "common fund doctrine" and the claim must fail under that theory. Finally the lawyers do not have a judgment lien on the interpleaded funds since they never acted to perfect their alleged lien under Nebraska law."

On September 1, 1993, the Eighth Circuit Court of Appeals denied the Olson Attorneys petition for rehearing with suggestion for rehearing en banc.

This Petition is being timely brought within 90 days of the Circuit

Court Order and Opinion.

REASONS FOR GRANTING THE WRIT

I.
The Lower Courts Have Construed Nebraska Law So As To Render It Meaningless In A Bankruptcy Setting Thus Requiring Correction And Supervision By This Court

This Court should grant certiorari for the reason that the courts below have construed the Nebraska Attorney Lien Act and the Nebraska equitable "common fund doctrine" in such a way as to make them meaningless within a bankruptcy setting. They have allowed the Internal Revenue Service to horn in on farming profits for which the Petitioners are largely responsible by the simple expedient of holding that the escrowee bank is not an adverse party thus making the Nebraska attorney lien law inapplicable, and by holding that, because only a "creator" of a common a fund can claim it, the debtors

attorneys (who did not grow the crop) do not qualify. Neither of these propositions has any basis in Nebraska law, as hereinafter demonstrated.

It is to be emphasized that the IRS claim against Mr. Olson has nothing to do with farming or the farm reorganization under Chapter 11 conducted by the Petitioners and their clients. As explained in In re Olson, 133 B. R. 1016, 1017, "Theodore V. Olson was both a self-employed farmer and the president, chief operating officer, and sole shareholder of Olson Brothers Manufacturing Company, an entity that manufactured and marketed center pivot irrigation systems." Mr. Olson, as a "responsible person," has been held personally liable for unpaid OBM social security taxes merely because OBM failed to specify that these taxes

were to be paid first before other tax obligations. Id. 133 B.R. at 1018. It is these "trust fund" taxes that IRS seeks to prefer in the second bankruptcy under 11 U.S.C. 507, thus placing itself in a superior position to Petitioners should they have no lien on the corn fund. Nothing could be more inequitable, unjust and in derogation of the bankruptcy laws.

II.

It Was Only Through the Tireless and Continuing Efforts of the Olson Attorneys That the 1982 Crop Was Grown And Sold And Other Benefits Were Realized

When the Olsons' first Chapter 11 was filed on March 1, 1982, the automatic stay went into effect and prevented Production Credit Association (PCA) from foreclosing its prior security interest in some 530,00 bushels of 1981 corn grown by Ted Olson. Throughout the summer, legal battles raged to prevent debtors

from selling the 1981 corn crop and using the proceeds to finance the 1982 corn crop, to prevent the debtors from seeking other financing, and to put the debtors out of business by foreclosing on their farm equipment.

There were innumerable court appearances and hearings requiring the preparation of voluminous pleadings, affidavits and taking of evidence. The docket of the first bankruptcy case is replete with the efforts of the debtors to seek a fair opportunity to reorganize and to prevent the creditors from putting them out of business.

The creditors attempted to make impossible the planting of the 1982 corn crop by bringing actions to replevin the debtors' farm equipment. The 1981 crop had to be sold and delivered to make room

to store the 1982 crop. Constant negotiations were required with nervous suppliers. Debtor was denied use of cash collateral and the crop was planted anyway on the credit of the suppliers. Anhydrous fertilizer and irrigation fuel were also denied to the point of crop damage. Fertilizer, fuel and resources were maintained as the result of the legal advice and services rendered in negotiating with suppliers and finding other ways to keep the farm operating.

Harvest expenses were resisted by PCA, Hancock and Prudential, and the Olson Lawyers had to intervene to gain the necessary fuel, manpower and equipment to complete the harvest.

Olson Lawyers assisted in arranging the sealing of the 1982 corn crop under the ASCS Farm Stored Feed Grain Reserve

Program, resulting in a profit to the estate of over one dollar ($1.00) above market price for 391,070 bushels of corn. Not only did PCA resist, but the U.S., Department of Agriculture (ASCS) denied sealing the corn at both the local level and state levels before Olson Lawyers successfully negotiated the sealing and loan with the ASCS regional counsel. There were numerous meetings and hearings on sealing the corn and escrowing the loan funds.

The 1982 crop benefitted the Debtors' estate with gross proceeds escrowed with the Overland National Bank in Grand Island in the amount of $1,122,370.90 corn loan and $105,377.05 1983 corn storage prepayment. After payment of expenses, as of June 25, 1983, there was $405.016.00 in the escrow

account.

At the time of filing the first Chapter 11 petition on March 1, 1982, the debtor had 513,000 bushels of 1981 corn on hand, with a market value of $2.25 a bushel. Legal services were provided by the Olson Lawyers overcoming the objections of PCA resulting in the sale of the 1981 corn at $2.75 a bushel, a gain of fifty cents a bushel or $256,600.00. (PCA had demanded that the corn be sold at $2.25 a bushel). A secondary benefit to the debtors' estate, made possible by the Olson lawyers, was the freeing of the Debtors' grain storage bins to permit the sealing of the 1982 crop.

The participation of Olson in the 1983 PIK program was resisted and through the efforts of the Olson Lawyers, the

Debtor qualified for the 1983 PIK program which was the only income earned from the Olson farms in 1983, since the court refused to permit the Debtors to farm in 1983.

Ironically, Prudential, the very party that led the fight to block the planting of the 1982 corn crop, claimed the proceeds thereof. Moreover, the United States and Prudential by bickering over the 1982 corn fund refused to allow its use to plant a 1983 crop. Moreover, they damaged the 1982 crop by their wanton irresponsibility in refusing to allow funds to be used for fertilizer and irrigation. They thus waived their right to any interest in the proceeds. Finally, they wantonly and foolishly forced debtors to idle their land in 1983 so that they could set up cause for dis-

missal on the ground that reorganization was hopeless.

The United States and Prudential have no legal, equitable or moral right to the 1982 corn fund. The bankruptcy court found abundant and sound reasons to deny them any rights in the fund, and these reasons are now the law of the case.

The Debtors' estate benefitted by the direct and proximate result of the efforts of Olson's lawyers in the following manner, all of which were actively and even hysterically resisted by PCA, Prudential and Hancock:

Net Proceeds To Estate

Profit from raising and sealing the 1982 crop.....$405,016.00

Increased profit by holding and selling 1981 crop....256,500.00

Qualifying Debtors in the 1983 PIK program.....316,605.00

TOTAL $978,121.00

The 1982 corn crop and proceeds resulted from the direct efforts of the Olson lawyers. The bankruptcy court in the second Chapter 11 proceeding found "as a fact that the 1982 corn crop would not have been even planted by the debtor-in-possession but for the efforts of the lawyers." In re Olson, 101 B.R. 134, 143 (A. 79). Without the Olson Lawyers there would not only have been no 1982 corn crop but none of the above profit.

The above was not just a "tireless effort" on the part of the Olson Lawyers, but a superhuman achievement against all odds. Ironically, no matter how hard they worked, the second bankruptcy court could find no way to secure their fees. Needless to say, as matters stand, this is a warning to debtors' attorneys

nationwide not to do all that can be done for their clients, but rather to ration their efforts and take no risk.

Certainly the $978,121.00 profit qualified as a "substantial contribution, but there was more. The Olson Lawyers were responsible for settling the PCA claim of over $4,500,000.00 against the estate. Also released were PCA's claims to the 1982 corn fund and its second liens on the lands of the estate. These lands appreciated dramatically in value during the first bankruptcy proceeding. It is thus to be emphasized that not only were Olson attorneys materially and directly responsible for creating the 1982 corn fund, but they preserved it and protected it from the PCA claim (and other claims). Moreover, the Chapter 11 filed by the Olson Lawyers on March 1,

1982, Cause No. BK-00379, stopped all foreclosures and efforts to foreclose. The diligent and successful efforts of the Olson Lawyers to resist the motions for Relief From Stay by Hancock, PCA and Prudential were also very substantial contributions to the estate.

The Olson lawyers were faced with three expert creditor law firms, with two nationally known counsel, who fought daily over the Olson estate as they strived to "do a job" for their creditor-clients. As far as the Olson lawyers could ever determine, they never gave a thought to whether putting the Olsons out of business was detrimental to the interests of their clients. Apparently the creditors involved, with fiduciary responsibilities to their shareholders and/or the public, never gave the

slightest thought to their own self interest but conducted a grudge fight against the debtors. They could have had so much more if they had cooperated and encouraged the debtors.

Isn't it strange, that despite a plethora of law to the contrary, the second bankruptcy court could not find a reason to secure the Olson Lawyers, even though:

(i) by the end of 1982, nine months after filing the first Chapter 11 petition, its docket had grown to some 230 entries; the Needler law firm had invested 1,696.2 hours and the Heinisch law firm had invested 623 hours in beating back creditor attacks. And, for the year 1983, the docket grew another 202 entries with the Needler firm adding another 988.64 hours and the Heinisch law

firm another 397.1 hours. Thus, at the end of 1983, shortly before the first bankruptcy was dismissed, the docket had 432 entries; the Needler firm had invested 2,684.85 hours and had advanced $13,288.39 in disbursements while the Heinisch firm had invested 1,020.1 hours in the case and had advanced $2,989.48 in disbursements. (See first bankruptcy docket and fee claims of Needler & Heinisch).

(ii) the failure to award fees to the Olson Attorneys by the first bankruptcy court can only be characterized as disobedience to the spirit if not the letter of then District Judge Arlen Beam's opinion in In re Olson, 36 B.R. 74 (D. Neb. 1983)

As previously stated, on March

13, 1983[2], the first bankruptcy court awarded the Olson Lawyers interim fees. However this order was vacated when it was discovered, on April 13, 1983 that the Olson lawyers had not formally applied for employment. But, on December 23, 1983, Judge Beam, reversed the bankruptcy court's order denying employment and declared that the Olson Lawyers were entitled to be employed nunc pro tunc from March 1, 1982 (the day the first Chapter 11 petition was filed). Id., 36 B. R. 77.

This should have had the effect of revitalizing the expunged orders granting interim fees, and should also have permitted the Olson lawyers to apply for additional interim fees. However,

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[2]Additionally, interim fees that the court awarded on November 29, 1982 were never paid.

the ink was hardly dry on Judge Beam's Order and Opinion before Judge Stageman, the first bankruptcy judge, reached back and revived a dormant motion for dismissal by Prudential (filed the previous May) and dismissed the case on January 29, 1984.

This had the effect, according to both the first and second bankruptcy courts of "putting everything back as it was" prior to the filing of the first petition, thus destroying any administrative priority of the Olson Lawyers.

Contrary to the opinion of the second bankruptcy court, the Olson lawyers had every reason to expect that their fees would be paid from the 1982 corn crop escrow once the frivolous claims of the opposing creditors thereto

had been defeated. What other source was there? When the bankruptcy court did not permit the debtor to further reorganize and dismissed the case in deference to unfair demands of the creditors, thus destroying their priority, the Olson lawyers had every right to look to the fund they had created for satisfaction.

As stated by Judge Beam at 36 B.R. 75 when granting the Olson Lawyers nunc pro tunc employment:

> "This result is particularly appropriate in the present case in which the Bankruptcy judge has expressly acknowledged the tireless efforts of the attorneys in representing the bankruptcy estate. Furthermore, the delay between the application and the denial of employment and further delays on

appeal must necessarily have caused expense and prejudice to counsel who properly have remained active on the debtor's behalf." (Emphasis added.)

III.
The Olson Lawyers As A Matter of Equity Were Entitled To a Lien on the 1982 Corn Crop Fund.

In S. T. Foods, Inc., 202 F. Supp. 37, 40 (D.C.S.D.N.Y. 1962), there was a question of whether a fund held by the trustee was part of the estate, but the Court resolved that by saying:

"[1] It is well settled that bankruptcy proceedings themselves are purely equitable in their character, and, within the limits prescribed by the bankruptcy act and the special rules of practice prescribed by the Supreme Court, are to be administered in accord with the general principles and practices of

equity." Westfall v. Avery, 171 F. 626, 628 (4-Cir. 1909); 11 U.S.C.A. 11, sub. a. See also Local Loan Co. v. Hunt, 292 U.S. 234, 54 S. Ct. 695, 78 L. Ed. 1230 (1934).

It is true that these equitable powers must be exercised within the limits laid down by the Bankruptcy Act and subject to its specific provisions (In re. Concentrated Products Corp., 88 F., 2d 745 (3rd Cir. 1930), and the court may not grant equitable relief which overrides a clear congressional mandate as to the manner in which claims should be marshalled or priorities afforded. In re. Columbia Ribbon Co., 117 F. 2d 999, 1002 (3 Cir. 1941). But this is not to say that the bankruptcy court in

the exercise of its equitable powers may not allow a charge which in equity and good conscience should be made against a fund in the hands of one of its officers and under its control. Such an allowance does not override any mandate of Congress expressed in the Bankruptcy Act and has been approved in the cases which have been cited above." (Emphasis Supplied).

At bar, the equitable powers of the bankruptcy court and/or the court in bankruptcy are specifically affirmed and endorsed in the Bankruptcy Code, 11 U.S.C., sec. 105, Power of Court[3]:

(a) The court may issue any order, process or judgment that is neces-

[3]This has not stopped the persistent efforts of creditors to denude bankruptcy courts of their equitable powers.

sary or appropriate to carry out the provisions of this title.

Accordingly, it is not just state lien law that should be considered, but the equity of applying that law within the bankruptcy context and pursuant to the equitable powers of the bankruptcy court.

At bar, the 1982 crop fund is property of the estate under 11 U.S.C. 541. It was first held by a third party, Overland National Bank, subject to the establishment of any claims thereto by those who might have an interest. There was a hiatus in its control by the bankruptcy court between the first and second Chapter 11 bankruptcy proceedings. It was at this point that various parties asserted their claims under state law, including the Olson Lawyers. The Overland bank could not release the fund

to any party without the permission of the debtor else it would breach its fiduciary duty. The Overland bank brought a declaratory judgment action in state court. The action was not an interpleader because the fund was not under court control at that point in any way, shape or form. Only when the debtor filed the second Chapter 11 case was the power of the bankruptcy court reasserted and the declaratory judgment action removed to bankruptcy court by way of the District Court's automatic referral.[4] 28 U.S.C., sec. 157.

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[4]However, in due course the funds were ordered deposited with the Clerk of the U.S. District Court for the Northern District of Nebraska, but this has no bearing on this declaratory judgment (interpleader) action. The results are the same either way. The interest of the Olson Lawyers is in the nature of a constructive trust on the proceeds of the corn crop no matter by whom or how they are held.

The fund has never been held by the Overland bank for the "benefit of the parties." It has always been held for the benefit of the debtors, subject to adverse claims. The Overland bank has never been "neutral," as suggested by the bankruptcy court. The Overland bank is the debtors' escrow agent and fiduciary and is as adverse to the claimants as the is the debtor and his creditors. It would have been impossible for the bank to bring a declaratory judgment action if it were not adverse. Pursuant to 28 U.S.C. sec. 2201, any court of the United States may order declaratory relief "in a cause of actual controversy within its jurisdiction." Id. The Act itself does not confer subject matter jurisdiction on the court to hear the declaratory judgment matter. "The Declaratory

Judgment Act is strictly remedial in nature and does not provide a separate basis for subject matter jurisdiction." Lawline v. American Bar Association, 738 F. Supp. 288 (N.D. Ill. 1990), affirmed, 956 F. 2d 1378 (7th Cir. 1992). The fact that this declaratory judgment (interpleader) action still pends is its own proof that an actual adverse controversy exists.

In short, the bank had to be an adverse party in order to bring the declaratory judgment action. It, of course, was adverse because it was the debtors' agent. Now the Clerk of the District Court is holding the fund on behalf of the debtor estate, subject to resolution of conflicting claims against it. The estate is still an adverse party to the claimants, and under the rationale

of In re S.T. Foods, Inc., 202 F. Supp. 37, 40 (D.C.S.D.N.Y. 1962) there is no reason why the bankruptcy court of equity cannot satisfy Petitioner's fees from that fund.

The authorities upon which the Court in In re. S. T. Foods, Inc. relied for this power (at 202 F. Supp. 40) are: Byrer v. Bushong, 108 F. 2d 594 (4th Cir. 1940); In re Prindible, 115 F. 2d 21 (8 Cir. 1940); In re. Centralia Refining Co., 35 F. Supp. 599 (E.D. Ill. 1940); In re Beardsley, 35 F. Supp. 799 (D. Md. 1941); 6 Remington on Bankruptcy 2606-2612, 2629 (5th Ed. 1952); 3 Collier on Bankruptcy 64.022, ftn 10 (14th ed. 1956), and cases cited in both texts. Cf. Sulmeyer v. Miller Engineering Co., 297 F. 2d 856 (9th Cir. 1962).

In In re. Paramount Publix

Corporation, 10 F. Supp. 504 (D.C.S.D. N.Y. 1934), the District Court allowed the Debtors' prior attorneys' fees in a subsequent Chapter 7 because equity demanded it.

Judge Beam (now Circuit Judge Beam) noted at 36 Br. 75: "Needler is an expert in insolvency law." The estate was large and complex and required the kind of patience and skill described in In re Paramount Publix, supra, to maximize and conserve it.

And in In re. Lesser, 100 F. 433 (D.C.S.D.N.Y 1900), the bankruptcy court, allowed fees for preserving assets of the estate, stating: "...it is competent for the court to make a reasonable allowance as indemnity for the costs and expenses by which these benefits have been obtained ...."

At bar there was a benefit of nearly a million dollars (well over with interest) for which the Olson lawyers were responsible. It is not too much to ask that their fee interest be protected by a charging, judgment or administrative lien on the fund proceeds at the Overland bank.

The equitable "common fund" doctrine, that a benefitted class should bear the cost of producing the benefit is well recognized and accepted. It is based upon state law. See In re Texaco, Inc., 85 B.R. 934, 938 (Bkrtcy. S.D.N.Y. 1988) which held that:

> "The "common fund" as a source of counsel fees was created single-handedly by the United States Supreme Court in Trustees of Internal Improvement Fund v.

Greenough, 105 U.S. (15 Otto) 527, 26 L. Ed. 1157 (1882) and repeated in Central Railroad & Banking Co. v. Pettus, 113 U.S. 116, 5 S. Ct. 387, 28 L. Ed. 915 (1885), both being non-bankruptcy cases where attorneys were given compensation for litigation that created, increased, or protected strangers' shares in funds as a result of the legal services rendered in successful litigation by the attorneys.

Having produced a fund of assets for this estate as a result of their state court litigation, the Anderson firm is entitled to rely upon the attorney's statutory charging lien with respect to their post petition legal services which are embraced under such lien. Id. 940. Gordon v.

Shirley Duke Associates, A.P.I., 611 F. 2d 15 (2nd Cir. 1979)."

Attorney Heinisch testified at the hearing before the bankruptcy court that the Olson lawyers relied on the 1982 crop funds in escrow as the source from which their fees would be paid. Indeed, that would prove to be the only source available in the event the debtors' "obdurate foes" prevented reorganization.

In Tuttle v. Wyman, 149 Neb. 769, 32 N.W. 2d 744, 749 (1948), the court ordered the payment of attorneys fees from the land, rents and profits which the attorney had saved for his client. It was understood and agreed that the attorney was to have a portion of the recovery as compensation.

At bar, all parties to the Olson Chapter 11 proceedings knew very well

that the only funds available to pay legal fees were the escrowed 1982 crop funds in the event the Olsons were not permitted to reorganize. Payment of legal fees from the escrowed 1982 crop funds should not be a surprise. Equity follows the natural and expected outcome --payment of the Olson legal fees from the available funds in the customary manner on a preferential and priority basis in the bankruptcy. Certainly, the Olson Lawyers were entitled to be rewarded from the escrow at least on an equitable quantum merit basis.

In In re. AFCO Enterprises, Inc., 35 B.R. 512, 515 (B.C.D, Utah, 1983), the court permitted the award of legal fees from the secured collateral proceeds even though the net equity in the property may have decreased while the Chapter 11

proceeded. The court spoke of the dire effects of ruling otherwise:

> "[F]ee claimants voluntarily contribute to the ideal of rehabilitation. Section 331 encourages this volunteerism and, as an inducement to work for the estate, is a vital provision of the Reform Act . . . . If the superiority, in turn, might pre-empt interim fees, it would jeopardize the further provision of services. The result would not be attractive. . . . [Fee claimants] might cut corners, but this would cause delay . . . . They might demand exorbitant retainers at the beginning of each case: but for most debtors this either would be impossible or would decrease their chances for rehabil-

itation.

It is likewise unfair, if not unrealistic, to expect counsel to underwrite the reorganization. This would drive experienced and expert counsel to more reliably lucrative fields of practice. Cf. Collier on Bankruptcy, supra, Section 331 at 331-2-331-3; In re International Horizons, Inc. 10 B.R. 895, 897 (N.E. Ga 1981);In re. Quick Release, Inc., 6 B.R. 713, 715 (Bkry., D.S.C. 1980): In re Western Farmers Ass'n., 8 B. R. 539, 542 (Bkrtcy. W. D. Wash. 1981); In re Callister, 15 B.R. 521, 523 (Bkrtcy. D. Utah, 1981).

The orderly administration of justice in bankruptcy cases depends upon willing and vigorous representation by

competent legal counsel. To require the Olson Lawyers to absorb the legal fees for extended and extensive litigation is unfair. Thousands of hours were invested to keep the debtors afloat and their creditors at bay. For the court to permit the creditors to blitz the debtors with ongoing contested hearings at every turn without payment of fees to debtors' lawyers is grossly unfair -- as unfair as it would be to allow the debtors to deprive their attorneys of priority for their fees by the simple expedient of bringing another Chapter 11 proceeding after dismissal of the first.

It is not necessary for the Olson lawyers to be administrative, judgment or charging-lien claimants in order to have priority lien. They need only have an equitable right to be reimbursed from the

fund. Since the courts below concede that but for the Olson Lawyers there would be no fund, they have the very highest of equitable claims to priority. It was therefore error for the bankruptcy court to deny priority to the Olson lawyers, especially when they were also administrative, charging-lien and judgment claimants, and further error for the District Court and Court of Appeals to affirm.

IV.

The Olson Lawyers Have a Valid Priority Administrative Claim

In In re. Jensen- Farley Pictures, Inc., 47 B.R. 557 (Bkrtcy. D. Utah, 1985), the court held that, in enacting the statute dealing with administrative expenses entitled to first priority status, Congress intended to adhere to the "direct benefit" rule of decisions

under Sections 242 and 243 of the Bankruptcy Act. Congress intended this to apply irrespective of whether there had been a confirmed Plan, and provided the expense met the "substantial contribution test". The court thoroughly outlined the priorities given by Section 503 of the Bankruptcy Code at 47 B.R. 56, and exhaustively discussed the reasons and legislative history behind them.

The Olson Lawyers certainly qualify under the substantial contribution and direct benefit tests. At this juncture, the Olson Lawyers are creditors and have produced a fund under a prior Chapter 11 which would qualify under former rule 10-215(c)(1)(B), and under the present Code provisions and rules cited above. The attorneys fees, expenses and services performed by the Olson Lawyers have been

previously found to be reasonable and necessary by Judge Beam as required by the direct benefit rule. He found these services to be beneficial to the estate and that they contributed to a plan which was not confirmed, but was aborted by a dismissal. Interim fees had been awarded by the bankruptcy court and then unfairly and unlawfully vacated. In Re Olson, 36 B.R. 74, 7-77).

As Collier states in Volume 6A of the 14th Edition, the main cornerstone was met, and that is the benefit to the estate.

Without the Olson Lawyers, there would have been no 1982 crop, no $978,121.00 profit and no 1982 crop fund to fight over. The Olson Lawyers are entitled to have their claim treated as a priority administrative expense against

the 1982 corn crop.

V.

The Olson Lawyers Should Have Been Allowed To Assert Their Attorney's Lien Against The Overland 1982 Corn Crop Fund For It Is Untrue That The Fund Was Held By Parties That Were Not Adverse

At the time the 1982 crop fund was created, it was property of the estate under 11 U.S.C. sec. 541, and the fund belonged to debtors, subject to the valid and to-be-established claims of the opposing parties. Had Bankruptcy Judge Stageman not made a determination that the 1982 corn fund was property of the estate, no order by him setting up the escrow at the Overland bank could have been valid. Such an order would have been void for want of jurisdiction.

28 U.S.C., sec 1334(d) grants the bankruptcy power to the United States District Courts for "exclusive

jurisdiction of all property wherever located as of the commencement of the case and of property of the estate."

The 1982 crop fund was clearly property of the estate of Sandra and Ted Olson under 11 U.S.C., 541, including all legal and equitable interests. (See Collier 15th Edition,, Section 541).

Certainly changing the crop into cash didn't change the nature of the property or its ownership. It was still personal property belonging to the estate.

The Olson Lawyers rendered fees and advanced costs in the bankruptcy case in which the fund was created, thus qualifying for an attorney's "charging" lien under Section 7-108 of the Nebraska Revised Statutes (quoted verbatim herein at page 5 and at A 8, 31 and 76). See

Reynolds v. Warner, 258 N.W. 462 (Neb. 1935). The Olson Lawyer's charging lien is against both Ted and Sandra Olson, both of whom the Olson Lawyers represented. Whether or not the lawyers obtained a judgment against Ted or Sandra Olson, or both, is totally irrelevant as it is not necessary to have a judgment for the Nebraska Attorney's Lien Act to come into play.

In Neighbors and Danielson v. West Virginia Hospital, 77 N. W. 666 (Neb. 1956), an attorney's lien was enforced even though the funds were in the Scottsbluff National Bank, in a special account, under a "Contract and Stipulation".

The charging lien is effective when the notice under Nebraska Revised Statute, Section 7-108 is given to the

party in possession of the fund. Kleger v. Schaneman, 322 N. W. 2d 659 (Neb, 1982). This notice need not be in writing. According to the Nebraska Supreme Court, any notice of existence of the claim is sufficient. As stated at 322 N.W. 2d 663:

> "Such notice is necessary to prevent bona fide settlement of the controversy by the litigants and payment by the debtors to the creditor in ignorance of the attorney's rights."

In support of the Olson Lawyers' position that the escrow agent is to be considered an adverse party, an agent of the debtor's estate against whom the Olson Lawyers have claim, see State of Nebraska v. Richter, 764 F. 2d 317, which involved money seized as part of a criminal investigation. The court held

that defendant's attorney was entitled to priority of his attorney's lien over tax liens filed by the IRS. The court found that the seizure of the money created an adversarial relationship. The court rejected the government's argument of the non-adversarial nature of the court-appointed receiver cases.[5] There is little or no difference between the loss of control in the Richter case and the adversarial holder of funds in that case and the loss of control at bar, where the court ordered the crop funds to be escrowed at the Overland bank pending resolution of the adversarial claims. It

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[5]It was error for the bankruptcy court to liken the Overland bank to a receiver. First, the appointment of a receiver is prohibited by Section 105 of the Bankruptcy Code, and the trustee in bankruptcy may clearly be adversary to a particular creditor against whom he may even bring suit.

is not necessary, as stated by the bankruptcy court, for the lawyer to have achieved a judgment or settlement of the case in order to have an attorney's lien.

In Tuttle v. Wyman, 149 Neb. 769, 32 N.W. 2d 744 (1948), rents and profits were held in trust by reason of a court order for the benefit of the devisees of a will. The Court permitted the attorney charging lien against the funds in the custody of the court. The court said:

> "It was all in the hands of the adverse parties, but actually in in the custody of the law and under the complete jurisdiction and control of the court for that purpose." (32 N. W. 2d 749).

It is untrue that under Nebraska law a third party escrowee or the Clerk of the Court is not adverse, for they are

holding for adverse parties, in this case the debtor and his creditors. Accord, Kleager v. Schaneman, 322 N.W. 2d 659 (Neb. 1982). As the Tuttle court noted further: ". . .the statute giving an attorney a lien on money in the hands of the adverse party must be liberally construed." (32 N. W. 2d 749).

Thus, it is not so much the kind of depository involved (e.g. clerk of court, bank or debtors' agent) that makes it adversarial, but rather whether the depository, by the terms of its employment, is to resist the claims against it. The escrow agreement specifically provided that the escrowee bank be reimbursed in the event it was necessary to file the declaratory judgment action that it did. When adverse claims were made, the Overland bank did not hesitate. It

brought suit for declaratory judgment premised on the adversarial relationship of the debtors to the adverse claimants. Clearly, the Olson Lawyers had a charging lien on the 1982 crop fund which they had created, which they had preserved and maximized, and which had been segregated in adversarial hands. The proper method to enforce a lien is to file a petition for intervention. Spettman v. Hofeld, 2 N.W. 2d 621, 141 Neb. 832. The Olson Lawyers did not need to intervene because (i) they were sued for declaratory judgment by the Overland bank, and (ii) they have in a sense intervened by filing fee applications and claims in the two bankruptcies. The procedure followed by the Olson Lawyers regarding their charging lien was proper and the Bankruptcy Court erred when it denied recovery.

The Olson attorneys met all of the requirements of Nebraska law when imposing their lien.

1. Fees and expenses are a claim in the same case as the fees and expenses arose, and that is true at bar. Reynolds v. Warner, 258 N.W. 462 (Neb. 1935).

2. A charging lien may arise out of an agreement between a client and his attorney, that the attorney is to receive a portion of the proceeds provided this appears to be the intentions of the parties. Neighbors & Danielson v. West Nebraska Methodist Church, 77 N. W. 667 (Neb. 1956). At bar this was the case, but in any event would be inferred by the circumstances as a matter of equity and client responsibility. The debtors would be estopped from asserting domain over these funds when they had not paid their

attorneys because of the crucial nature of the services provided in creating the fund. The balance of such funds after the object of the escrow is fulfilled, is subject to attorneys' liens. State ex rel. Nebraska Bar Assn. v. Bachelor, 139 Neb. 253, 197 N.W. 138 (1941).

3. The object of a charging lien is to procure an attorney payment out of the fruits of his own labor. Jones v. Duff Grain Co., 95 N. W. 1, 61 N.E. 91 (1903).

4. The proper method of enforcing a charging lien is by resorting to equity because a lien is equitable in nature. Kleager v. Schaneman, 322 N. W. 2d 659 (Neb. 1982).

5. The lien commences from the time of giving notice of the lien to the adverse party or party having possession

of the claim against the fund is sufficient notice and need not be in writing or in any specific form. Kleager v. Schaneman, 322 N. W. 2d 659 (Neb. 1982). At bar, it is undisputed that notice was given to the Overland bank by the Olson Lawyers.

6. In makes no difference if the funds are interpleaded or held in the hands of an escrow agent. The fund which was in dispute and subject to the attorneys' charging lien in Kleager v. Schaneman, 322 N. W. 2d 659 (Neb. 1982) was paid to the Clerk of the District Court.

7. The attorneys lien is paramount to any rights of the parties in the suit. Meyers v. Miller, 134 Neb. 824, 279 N. W. 778, 117 A.L.R. 977. This is the origin of the administrative priority in

bankruptcy of the lawyers' fees. Accordingly, the Olson Lawyers charging lien is superior and paramount to the claims of the debtors, IRS, PCA or any other creditor.

8. Funds held for a special purpose after accomplishment of the purpose are accordingly then subject to an attorney's lien on the balance remaining. State ex rel Nebraska Bar Assn. v. Bachelor, 139 Neb. 253, 297 N. W. 138 (1941). The claims to the 1982 corn fund have now been satisfied, released or found unjustified. The fund is now correctly subject to the charging lien of the Olson Lawyers.

9. A charging lien exists until satisfied or released. The charging lien of the Olson Lawyers has never been satisfied or released. It should

declared by this Court to remain effective in order to protect the labors, the "tireless efforts," of the Olson Lawyers.

VI.

The Bankruptcy Court Should Have Declared The Olson Lawyers' Judgment Against Ted Olson To Have Priority As A Judgment Lien Against the 1982 Crop Escrow Held By The Overland Bank

Had there been no second Chapter 11 filing, the Olson Lawyers would have simply perfected their default judgment against Ted Olson and asserted it in state court against the corn fund in the declaratory judgment action brought there by the Overland bank. It was unnecessary to apply to state court or take other steps to "perfect" the judgment. Because, as previously noted, the bankruptcy court had jurisdiction of all of the debtors property, because the

declaratory judgment action was removed to bankruptcy court, and because the bankruptcy court is a court of equity, there was no need to go further. The Olson lawyers did not need to proceed further for a determination of ownership under state law because the Overland bank had brought a declaratory judgment action to accomplish that purpose. The bankruptcy court should simply have recognized the default judgment against Ted Olson as another reason the Olson Lawyers should be granted a priority lien against the 1982 corn fund. Clearly, had it not been Mr. Olson's desire and agreement to grant the Olson Lawyers priority in the 1982 corn fund, he would not have permitted the default judgment.[6] There

[6]As a matter of fact, on March 16, 1984, Theodore V. Olson entered an agreement on legal fees with his

was no reason or circumstances preventing the Olson Attorneys from a priority lien against the 1982 crop fund at the Overland bank as is customary in such cases.

CONCLUSION

Petitioners, the Olson Lawyers, William L. Needler of William L. Needler & Associates, Ltd. and Frank Heinisch respectfully request this Court to hear and grant its Petition for Writ of Certiorari to the United States Eighth Circuit Court of Appeals, to reverse and vacate the judgments below with instructions to the bankruptcy court to order a priority lien in favor of the

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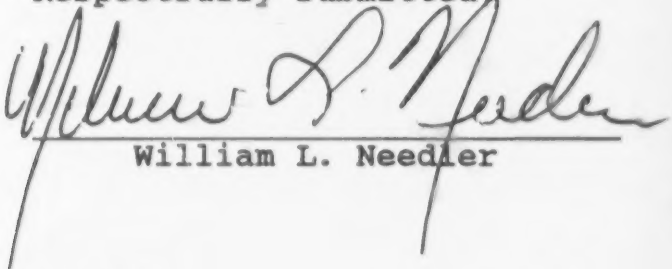
attorneys which provided that the attorneys had a lien upon money in the hands of adverse parties and the Overland Bank is listed as one of those parties (A 123.

instructions to the bankruptcy court to order a priority lien in favor of the Olson Lawyers against the 1982 corn crop fund, pursuant to a final and complete award and accounting of fees and costs by bankruptcy court.

Additionally, Petitioner requests whatever other relief this Court deems equitable and just.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3202

United States of America, Appellee,	
v.	Appeal From
Theodore V. Olson; Sandra A. Olson,	the United States District Court
Defendants-Appellees,	for the District of
William L. Needler of William L.Needler & Associates, Ltd., Frank C. Heinisch of Heinisch Law Office,	Nebraska.
Appellants.	

Submitted: May 13, 1993
Filed: July 21. 1993

Before BOWMAN and MAGILL, Circuit Judges, and HENDREN[1] District Judge.

This appeal involves a claim for attorneys' fees in connection with a bankruptcy matter which claim was initially denied by a bankruptcy court

[1]The HONORABLE JIMM LARRY HENDREN, United States District Judge for the Western District of Arkansas, sitting by designation.

and then, on appeal, by the district court's affirmance of that denial.

The claimants are the appellants, William L. Needler of William L. Needler & Associates, Ltd. and Frank C. Heinisch of the Heinisch Law firm (hereinafter called the "lawyers") who represented Ted and Sandra Olson (the "Olsons") in a Chapter 11 bankruptcy which was filed March 1, 1982 in U.S. Bankruptcy Court, District of Nebraska.[2] By their legal advice and counseling, the lawyers, over the protests and objections of several creditors rendered services which facilitated the harvesting of a substantial corn crop in 1982. After payment of certain administrative claims authorized by the bankruptcy court, there

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[2]Hon. Richard F. Stageman (hereinafter called the "First Bankruptcy.")

remained of the proceeds from [the] 1982 corn crop some $294,000.00 (the "fund"). Numerous parties -- not including the lawyers -- claimed an interest in this fund and, by agreement of Olsons and all such claimants, the fund was placed in an escrow account with Overland National Bank of Grand Island (the "bank"). The bankruptcy court ordered that the liens of all claimants to the 1982 corn crop be transferred to the fund and that any entity or individual with a claim to the 1982 crop proceeds make application for payment of that claim out of the fund by February 25, 1983. The lawyers made no such application. Thereafter, on January 1984, the first bankruptcy case was dismissed by the bankruptcy court. The United States District Court for the District of Nebraska affirmed this

dismissal and there was no appeal from that affirmance.

On March 15, 1874, the lawyers obtained a judgment against Ted Olson (but not against Sandra Olson) in Nebraska state court for some $359,030.35, plus costs and interest ("the lawyer's judgment").

On July 27, 1984, the bank filed an interpleader action in district court and paid the fund into the registry of the court.

On May 13, 1985, Olsons filed a second Chapter 11 bankruptcy petition.[3]

On July 8, 1984, the district court transferred the interpleader action filed by the bank over to the bankruptcy court

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[3]Hon. Timothy J. Mahoney, Chief Judge, U.S. Bankruptcy Court, District of Nebraska (hereinafter called the "Second Bankruptcy").

for disposition as an adversary proceeding in connection with the bankruptcy case.

The bankruptcy court denied the lawyers' claim for a lien on the fund holding, inter alia, that the lawyers (a) could not properly claim a lien under the Nebraska Attorney Lien Statute (Nebraska Revised Statute, par. 7-108 (reissued 1987)); (b) could not claim an interest in the fund based upon a judgment lien; and (c) could not claim an interest in the fund as a matter of equity. In re Olson, 101 B. R., 134 (Bankr. D. Neb. 1989).

The decision of the bankruptcy court was affirmed by the United States District Court for the District of Nebraska (Hon. William G. Cambridge) in a Memorandum Opinion and Order dated July

6, 1992, and filed for record July 8, 1992.

Standard of Review

A district court may review a bankruptcy court's legal conclusions de novo, but the bankruptcy court's findings of fact shall not be set aside unless clearly erroneous. Bankr. R. 8013; See e.g., In re Hunter, 771 F. 2d 1126 (8th Cir. 1985); In re Martin, 761 F. 2d 472 (8th Cir. 1985); See also Bank. R. 7052 (Fed. R. Civ. P. 52 applies in adversary proceedings). The Circuit Court, as the second court of review, conducts an independent review of the bankruptcy court's judgment asking whether the bankruptcy court's legal conclusions are correct and whether its factual findings are clearly erroneous. Wagner v. Gruenwaldt, 821 F. 2d 1317, 1320 (8th

Cir. 1987).

Accordingly we review the appellants' contentions based on the foregoing standards of review.

Discussion

The central issue on appeal is whether the lawyers, in a second bankruptcy, should have a lien on a fund generated during the first bankruptcy when no such lien was claimed before the first bankruptcy was finally terminated. Nebraska law governs this issue. In re Pierce, 809 F. 2d 1356, 1359 (8th Cir. 1987) (nature, extent and validity of claimed attorneys' lien in federal bankruptcy proceedings is determined by state law).

The lawyers assert their lien under several different theories, all of which will be discussed:

Statutory Attorney's Lien Theory

The lawyers claim they are entitled to an attorneys' lien on the fund under Nebraska law and that the lower courts erred in failing to so hold.

In Nebraska, the only statutory provision providing for a lien for an attorney's fee is Nebraska Code, par 7-108 which reads as follows:

> An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party.

The above statute, in derogation of common law, must be strictly construed. Lewis v. Gallemore, 175 Neb. 279, 121 N.W. 2d 388, 391 (1963).

The account held by the bank was

created pursuant to an order of the bankruptcy court in the first bankruptcy case which directed that the proceeds of the 1983 corn crop be deposited in an escrow account selected by the parties. The lawyers were not among the "parties" making this agreement, and, in fact, were not at that time claiming a lien for services rendered. The bank was acting for the benefit of all known claimants to the fund. It had no interest in the proceeds and was completely indifferent as to which claimant would ultimately get all or part of the fund. Other than having an interest in obtaining their escrow fees, it is undisputed that the bank had no beneficial interest in the funds thus placed in escrow.

Where it appears that money is neither in the hands of the attorney nor

in the hands of an adverse party -- but rather is in the hands of a third party -- an attorney may not have a lien under Nebraska law. See Lewis v. Gallemore, 175 Neb. 279, 121 N.W. 2d 386 (Neb. 193); and Culhane v. Anderson, 17 F. 2d 559 (9th Cir. 1927). Under Nebraska law, a bill of interpleader is an equitable remedy whereby a disinterested stakeholder in possession of a fund or other property claimed by rivals may require the rivals to litigate among themselves as to the issue of the ownership without embroiling the stakeholder. See Burke Lumber & Coal Co. v. Anderson, 162 Neb. 551, 76 N.W. 2d 630 (1956).

The lower courts were correct in holding that the bank was not an adverse party within the meaning of the Nebraska

attorney lien statute, but, instead and in fact, was a "disinterested stakeholder" which had been asked by interested parties to perform the very service that it did perform.

In this case, the lawyers' lien claim is based on services provided in the first bankruptcy which was dismissed in January of 1984. Prior to that dismissal, the lawyers failed to assert any lien on the corn crop fund which was ultimately interpleaded. After dismissal of the bankruptcy case, the lawyers attempted to assert a lien against the proceeds then in possession of the bank and this, among other things, caused the bank to file the interpleader action. The facts therefore show that if the lawyers had been entitled to any type of attorneys' lien under Nebraska law, it

would have been valid only during the pendency of the first bankruptcy proceeding. The district court found and the record shows that the bankruptcy court expressly invited the parties with claims against the fund to apply to the court for payment by a specific date and the lawyers made no such application. On oral argument, counsel for the lawyers stated no such application was made since it was believed such an application would be useless in view of prior rulings by the bankruptcy courts. A review of the orders in this case as well as various reported related cases, failed to support that assertion. See In re OIson, 20 B.R. 206 (D. Neb. 1982); In re Olson, 21 B. R. 123 (D. Neb. 1982); In re Olson, 22 B. R. 473 (D. Neb. 1982); In re Olson, 36 B.R. 74 (D. Neb. 1982); In re Olson, 730 F. 2d

1109 (8th Cir. 1984); In re Olson, 101 B. R. 134 (Bankr. D. Neb. 1989), 133 B. R. 1016 (D. Neb. 1991), adhered to, mod. on reconsideration, Nos. 89-0553-555, 1992 U.S. Dist. LEXIS 1114 (D. Neb. July 6, 1992); Order of the Bankruptcy Court; and Memorandum Opinion and Order of the District Court, filed July 6, 1992.

We therefore believe that, in rejecting the lawyers' claim of an attorneys' lien under the Nebraska lien laws, the legal conclusions of the bankruptcy court are correct and their factual findings are not clearly erroneous.

Equitable Lien Theory

The lawyers also claim a lien on the fund interpleaded by the bank under general equitable principles. They assert they are responsible for the

existence of the fund and contend they should be rewarded from the proceeds thereof prior to other creditors as a matter of equity under the common fund doctrine. The so-called "common fund doctrine" has been enunciated in Nebraska as follows:

> Where one has gone into a court of equity and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs of the litigation including reasonable attorney's fees to complainant's counsel.

Blacker v. Kitchen Brothers Hotel Co., 133 Neb. 66, 273 N.W. 836 (1937). The scope of application of this "common fund doctrine" is limited and generally is applied only for "denominating reasons of justice." See Riddle v. Hudgins, 58 F. 490 (8th Cir. 1893) and Linn v. Linn, 146 Neb. 566, 21 N.W. 2d 283 (1946).

In this case, the bankruptcy court acknowledged the lawyers had rendered services during the prior bankruptcy that made it possible for the planting of the 1982 corn crop. However, the court concluded the attorneys had not "created" the fund as is required by the "common fund doctrine." The court noted the attorneys had not obtained a judgment or a settlement that had resulted in the accumulation of the monies nor had they actually done the planting and harvesting of the corn crop. This was done by the clients.

The lawyers argue they "created the fund" by providing legal services to the Olsons which made it possible for them to secure financing, avoid foreclosure or a loss of farm machinery and to otherwise produce the 1982 corn crop. The lower

courts rejected this contention and no case has been cited or found which so holds. If this argument has merit, one might also meritoriously argue that any service of a lawyer to a business client would entitle the lawyer to an equitable lien on the client's subsequent earnings. Such is not the law, nor, in the court's opinion, should it be.

There is some authority for the proposition that where services by lawyers directly result in the creation or preservation of a fund, the "common fund doctrine" might apply. See Kaiman v. Mercy Midlands Medical and Dental Plan, 1 Neb. C. A. 453, 491 N.W. 2d 356 (1992). However, in the case at bar, it is clear that the services provided by the lawyers in the prior bankruptcy action did not directly result in the

creation of the interpleaded funds.

The court perceives no "denominating reasons of justice" mandating that the lawyers be awarded an equitable lien on the interpleaded fund. The lawyers did not have an agreement with the Olsons to recover their fees from the proceeds of the 1982 corn crop which became the interpleaded fund and the lawyers did not assert a claim against the fund during the first bankruptcy proceeding even though the bankruptcy court had expressly directed that any claims against the fund be made by a specific date. See State v. Citizens Bank, 117 Neb. 860, 223 N.W. 282 (1929) (denying claim of attorneys to equitable lien on fund resulting from judgment because the attorneys had no agreement with the client to recover their fees from the proceeds of the

litigation and did not file a claim for a lien on the judgment - court held there was entire lack of equity in attorneys' claim for preference). Under these facts, the lower courts did not abuse their discretion in determining that the lawyers are not entitled to an equitable lien on the interpleaded fund. We believe that determination is based upon correct legal conclusions and factual findings which are not clearly erroneous.

Judgment Lien Theory

After the dismissal of the first bankruptcy case, the lawyers obtained a judgment by confession against one of the debtors -- Ted Olson. The judgment was not taken against Olson's wife, Sandra. Although this issue was considered by the bankruptcy court, the lawyers failed to reassert the issue on their appeal to the

district court. Accordingly, this issue should not be considered by this court at all as it was waived when the lawyers did not bring it to the attention of the district court. The court notes, in passing, however, that under Nebraska law, a judgment lien attaches to personal property of the debtor "from the time (it is) seized in execution." Neb. Rev. Stat. par 25-1504 (1989).

In this case, the lawyers never seized the crop proceeds in execution. As the bankruptcy court noted, the lawyers commenced garnishment proceedings against the bank but failed to complete the process under relevant Nebraska provisions. Nebraska requires strict compliance with attachment procedures as set out in the statute and failure to follow the same results in failure of the

asserted judgment lien. See E.C. and Hybrid v. Growers Seed Assn., 219 Neb. 296, 363 N.W.2d 362 (1985). Accordingly, the bankruptcy court was correct in holding that the lawyers have no judgment lien on the fund in question.

Summary and Conclusion

In summary, under governing Nebraska law, the lawyers do not have an attorneys' lien since the facts do not bring their claims within the purview of the statute in question. They are not entitled to an equitable lien under the "common fund doctrine" since the proof did not establish that the lawyers "created" the fund on which the lien was claimed. At best, the lawyers demonstrated that their legal services facilitated the growing of the crop which resulted in the creation of the fund.

The facts therefore do not bring the claim within the purview of the "common fund doctrine" and the claim must fail under that theory. Finally the lawyers do not have a judgment lien on the interpleaded funds since they never acted to perfect their alleged lien under Nebraska law.

For the reasons hereinabove stated, the findings and orders of the lower courts are in all respects affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3292NEO	)
	)Order Denying
United States of America,	)Petition For
Appellee,	)Rehearing and
	)Suggestion For
William L. Needler, et al.	)Rehearing En
Appellants.	)Banc

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

September 1, 1993

Order Entered at the Direction of the

Court: /s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF THEODORE V. OLSON, and SANDRA ANN OLSON, Debtors.	)	CV 89-0-533 CV 89-0-554 CV 89-0-555
WILLIAM L. NEEDLER, et al vs. UNITED STATES OF AMERICA, Appellee.	)	MEMORANDUM OPINION and ORDER

THIS MATTER is before the Court on two motions for reconsideration by William L. Needler et al., the lawyers for Debtor Theodore V. Olson (Filings No. 35 and 36, respectively, in CV 89-0-554).[1]

[1]Three appeals were filed, by three separate parties, from the Bankruptcy Court's Order of May 30, 1989, and each was incorrectly, assigned a separate case number by the Clerk of the Court. The appeal by the Olson attorneys, the subject of the instant order, was designated CV89-0-553; the appeal by the United States was designated CV89-0-554; and the appeal by the Olsons was designated CV 8999-0-555. That confusing situation was compounded when the Olson attorneys miscaptioned their appeal of the dismissal for lack of jurisdiction -- they captioned it CV 89-0-554, while the order had been filed in CV89-0-553.

Specifically Needler et al. ("the lawyers" or "the Olson lawyers") have asked the court to reconsider its Order dismissing, for lack of jurisdiction, their appeal of the Bankruptcy Court's Order of May 30, 1989, on the issue of payment of attorney fees and reimbursement for expenses (Filing No. 4 in CV 89-0-553); they have also asked the Court to reconsider the memorandum Opinion and Order affirming the Bankruptcy Court on the issue of the liability of Theodore V. Olson under 26 U.S.C., sec. 6672 (Filings No. 33 and 34, respectively, in CV 89-0-554).

The Court will grant both motions for reconsideration, will vacate its

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In order to alleviate future confusion, the Court has ordered the three cases be consolidated in CV 89-0-554. (Filing No. 42).

Order of Dismissal, and will modify its Memorandum Opinion and Order in the manner set out below.

I. THE ORDER DISMISSING THE APPEAL FOR LACK OF JURISDICTION (FILING NO. 4 IN CV 89-0-553)

The Court has reconsidered and will vacate this Order. However, the Court will affirm the order of the Bankruptcy Court for the substantive reasons set forth below.[2]

A. DISMISSAL FOR LACK OF JURISDICTION WAS IMPROPER AND THAT ORDER IS THEREFORE VACATED.

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[2]The Court also recognizes that the Order dismissing the appeal for lack of jurisdiction ought to have been, but was not, extended to the other two appeals which were, as noted above, erroneously placed in separate files. Those appeals were denied, in Filings No. 34 and 35 of CV 89-0-554. That issue is now moot, because the dismissal has been reconsidered and vacated.

The Bankruptcy Court Order appealed from was entered on May 30, 1989. In the matter of Olson, 101 Bankruptcy Reporter 134 (S. Neb. 1989). Under Bankruptcy Rule 8002 a party seeking to appeal an order is given ten days in which to file notice of such appeal with the Clerk of the Bankruptcy Court. That time period is, in turn, governed by Bankruptcy Rule 9006(a) which, in the first half of 1989[3], read as follows:

> When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from computation.

Under that Rule, because a weekend intervened, the original appeal file date was June 11, 1989. However, on June 14, 1989 Bankruptcy Judge Mahoney entered an

[3]Rule 9006(a) was amended effective August 1, 1989.

Order extending the appeal filing date for twenty days. Bankr. Filing No. 90, Exhibit "A" Filing No. 35 in CV 89-0-554). That made the effective filing date July 1, 1989 (twenty days beyond June 11, 1989). However, because July 1 was a Saturday, the actual effective filing date was July 3, 1989. Because the appeal notice was, in fact, filed on July 3, 1989, it was timely. This Court therefore had jurisdiction over the appeal, and the Order of Dismissal (Filing No. 4 in CV89-0-553) is vacated.

B. THE OLSON ATTORNEYS ARE NOT ENTITLED TO ATTORNEY FEES OR REIMBURSEMENT.

Because the Court finds that it has jurisdiction over this notice of appeal the Court will next consider the substance of that appeal on the issue of whether the lawyers are entitled to

recover fees and expenses from funds currently on deposit in the Overland National Bank.

In considering an appeal from the Bankruptcy Court, this Court may review the Bankruptcy Court's legal conclusions de novo but the Bankruptcy Court's findings of fact may not be set aside unless clearly erroneous. Bankr. R. 8013; Wegner v. Gruenewaldt, 821 F. 2d 1317, 1320 (8th Cir. 1987); In re Martin, 7611 F. 2d 361 (8th Cir. 1985). However, the scope of review of equitable determinations by the bankruptcy court is limited to an abuse of discretion standard. Time Oil Co. v. Wolverton, 491 F. 2d 361 (9th Cir.) cert. denied, 417 U.S. 947, 94 S. Ct. 3072, 41 L. Ed. 2d 667 (1974); Hassler v. Assimos, 53 Bankr. 453 (D. Del. 1985); In re Supreme

Plastics, 8 Bankr. 730 (N.D. Ill. 1980).

The facts as found by the Bankruptcy Court are affirmed by this Court, and the facts relevant to this particular appeal may be summarized as follows: On March 1, 1982, Sandra and Theodore Olson, farmers in Holt County, Nebraska, filed a Chapter 11 petition. During those proceedings they were represented by three law firms: Heinisch & Bryan Law Offices, William L. Needler & Associates, and Berry, Anderson, Creager & Witt-struck. In the fall of 1982 the Olsons, largely "[b]ecause of the legal efforts of the lawyers, were successful in producing a . . . crop, paying the secured and unsecured suppliers, and turning the crop into actual cash soon after the harvest." Matter of Olson, 101 Bankr. 134, 143 (D. Neb. 1989).

Following various payments authorized by the Bankruptcy Court, some $294,000 remaining after the sale of the 1982 crop was place into an independent escrow account with the Overland National Bank of Grand Island, with the approval of the Bankruptcy Court.

In January of 1984, the Bankruptcy Court dismissed the Olson's Chapter 11 action. In March of 1984 the lawyers who had represented Olsons obtained state court judgment against Theodore Olson for an amount exceeding $300,000. A summons in Garnishment was issued against Overland National Bank on or about June 20, 1984, but no payment was made on the judgment. Overland Bank instead filed a declaratory judgment action against all claimants.

The Olson lawyers claimed an

interest in the escrow fund on two theories the first grounded upon the Nebraska Attorney Lien Statute, Neb. Rev. Stat. par. 7-108 (Reissue 1987) and the second upon general equitable grounds. The Bankruptcy Court rejected both theories, and this Court will affirm the Bankruptcy Court.

The Nebraska Attorney Lien Statute provides that

> An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to the party. Neb. Rev. Stat.par 7-108.

In [order] to recover on this theory the funds must be "in the hands of the attorney himself, or in the possession of the adverse party . . . ." Philips v.

Hogue, 63 Neb. 192, 196, 88 N.W. 180 (1910). The lawyers do not, and cannot, allege that the funds are in their hands; their claim must, therefore, rest upon the argument that the funds are in the hands of an adverse party. However, the Overland Bank, as escrow agent, is not an adversary. The Bankruptcy court found, as a finding of fact, that "the lawyers were not in an adversarial posture with the escrow agent." Olson, 101 Bankr. at 144. This Court agrees; Overland Bank, in its role as escrow agent, was a neutral party. Cf. Culhane v. Anderson, 17 F. 2d 559 (8th Cir. 1927) (federally-appointed receiver is not "adverse party" within meaning of this statute)1 State ex rel. Sayre v, Moore, 40 neb. 854, 59 N.W. 755 (1984) (state treasurer is not adverse party for purposes of this statute, even

though holding funds appropriated to client by legislature). Accordingly, the attorney lien statute does not apply, and the Olson lawyers may not recover under that theory.

In denying the lawyers' claim for fees and reimbursement on general equitable principles, the Bankruptcy Court concluded that the lawyers may have han an administrative claim in the 1982 bankruptcy case. [However] [u]pon dismissal of the case, their claim for fees bec[ame] an unsecured claim against the debtor who promised the payment." Olson, 101 Bankr. at 144. Based on review of the facts below, this Court finds that such a conclusion does not constitute an abuse of discretion. Accordingly, the holding of the Bankruptcy Court is affirmed on this

issue as well.

II. THE MOTION FOR RECONSIDERATION OF THIS COURT'S ORDER AFFIRMING THE BANKRUPTCY COURT ON THE ISSUE OF OLSON'S LIABILITY UNDER 26 U.S.C. PAR. 6672.

Having reviewed its Memorandum Opinion (Filing No.1 33) and Order (Filing No. 34), the Court finds that the motion for reconsideration (Filing No. 36) should be granted.

After reconsideration, the Court finds that its Memorandum Opinion should be modified in the following manner: the words, "totaling $184,220.96", appearing in the eleventh (11th) line of page 3 should be and hereby are stricken; the Memorandum Opinion shall remain unchanged in all other respects. Similarly, the Order shall be modified in the following manner: the words "in the amount of $184,220.96 should be and hereby are stricken. The Order shall remain

unchanged in all other respects.

IT IS THEREFORE ORDERED:

(1) The motion for reconsideration by William L. Needler et al. (Filing No. 35 in CV 90-0-554) is granted.

(2) This Court's Memorandum Opinion and Order dismissing the notice of appeal filed by William L. Needler et al. (Filing No. 4 in CV 89-0-553) is vacated.

(3) The finding of the Bankruptcy Court that William L. Needler et al. had no right to payment of fees from, or reimbursement of fees from, funds on deposit at the Overland National Bank is affirmed;

(4) The motion for reconsideration (Filing No. 36 in CV 89-0-554) is granted; and

(5) This Court's Memorandum Opinion (Filing No. 33 in CV 89-0- 554) are

modified as described above.

DATED this 6th day of July, 1992.

BY THE COURT:

/s/ William G. Cambridge
WILLIAM G. CAMBRIDGE,
United States District Court

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
THEODORE V. OLSON and SANDRA ANN OLSON, Debtors.	)	CASE NO. BK85-1085 A85-181
	)	
THE OVERLAND NATIONAL BANK OF GRAND ISLAND, Plaintiff	)	CH. 11
vs.	)	
	)	
THEODORE V. OLSON, et al. Defendants.	)	

MEMORANDUM

This case concerns numerous issues with regard to tax liabilities and lien priorities. Trial of the issues was bifurcated with a memorandum filed on June 3, 1988, concerning some issues and trial on others which concern the extent and priority of liens attaching to a fund of money was tried for three days in June, 1988, and two days in September, 1988. Briefs and written final arguments were ordered. All materials were

received by March 1, 19899. Robert Creager of Berry, Anderson, Creager & Wittstruck, PP.C., Lincoln, Nebraska appeared on behalf of the debtors; Frank Heinisch of Geneva, Nebraska, appeared on behalf of Law Firm creditors. Loren Mark and Tom Carlucci of the Tax Division, U.S. Department of Justice, Washington, D.C. appeared on behalf of the United States. Richard Anderl of Kutak, Rock & Campbell, Omaha, Nebraska, appeared on behalf of Prudential Insurance Company of America.

The parties agreed and this Court finds that this matter is a core proceeding under 28 U.S.C., par 157. This memorandum constitutes findings of fact and conclusions of law pursuant to Fed. R. Civ, P. 52 and Bankr. R. 7052.

This case has been tried in two

parts, the first part concerned whether or not debtor Theodore V. Olson was a "responsible party" as that term is defined under the Internal Revenue Code, making him responsible for a 100 percent penalty for his failure o assure that Olson Brothers Manufacturing, Inc., a corporation, paid the Internal Revenue Service "trust fund" taxes. A memorandum on the responsible party portion of he case was filed on June 3, 1988. 101 B.R. 128 (1988).

This memorandum concerns numerous issues regarding the priority of various parties to a fund of money resulting from the 1982 farming operations of Theodore V. Olson and Sandra Olson. Theodore V.Olson and Sandra Olson were debtors in 1982 under a Chapter 11 filing then pending in the United States Bankruptcy

Court for the District of Nebraska. The Olsons' bankruptcy filing, No. BK82-379, filed on March 1, 1982, was eventually dismissed.

Findings of Fact

This Court will make findings of fact which apply to all parties. The Court will then make certain factual and legal findings with regard to each claimant.

General Findings

The case is before the Court because the debtors, Theodore and Sandra Olson, who were farmers in the Holt County, Nebraska area, filed a Chapter 11 petition on March 1, 1982. However, after extensive litigation in the Bankruptcy Court the debtors were able to plant, care for and harvest a crop in the farming year 1982. After orders were

entered by the Bankruptcy Court authorizing payment from the proceeds of the crop to certain administrative claimants, a fund of money in the approximate amount of $294,000 remained. Numerous parties claimed an interest in that fund. By agreement of all the parties, the fund was placed in an escrow account with the Overland National Bank of Grand Island. Such procedure was approved by the Bankruptcy Court and the Bank was directed by court order to keep possession of the fund until further order.

During the pendency of the 1982 bankruptcy case, the Internal Revenue Service assessed against Theodore V. Olson a one hundred percent penalty under Section 6672 of] Internal Revenue Code. The assessment was the result of an

evaluation by the Internal Revenue Service that Mr. Olson was responsible party with regard to "trust fund taxes" owed by Olson Brothers Manufacturing, Inc., (OBM).

In January of 1984, the Bankruptcy Court dismissed the Chapter 11 case under Section 1112(b). The debtors' lawyers filed a motion to reconsider such dismissal and alleged that it was erroneously entered based upon the facts of the case. In addition, debtors' lawyers alleged that dismissal would prejudice the administrative claimants, including the lawyers, all of whom had fee applications pending or had provided services to the debtor or to the estate for which they should be compensated. The motion specifically alleged that the Court must have overlooked the pending

fee requests that it should reconsider its order to enable the Court to enter a comprehensive order which would preserve fee allowances to the attorneys.

The Bankruptcy Court overruled the motion for reconsideration. Debtors then appealed to the District Court which affirmed.

Following the January dismissal, the Internal Revenue Service on February 6, 1984, filed a "notice of federal tax lien under Internal Revenue laws" with the County Clerk of Holt County, Nebraska, the appropriate office for filing documents to perfect a lien against Theodore V. Olson's property based upon the assessment made, assuming such assessment was valid.

In March of 1984 the lawyers who had represented the debtors in the bankruptcy

case obtained a state court judgment against Theodore V. Olson for attorney fees in an amount exceeding $300,000. In June of 1984, the lawyers attempted to execute against the fund held by Overland National Bank of Grand Island. In response to the garnishment, but after the appropriate answer to the garnishment had been filed, the Bank filed a declaratory judgment action in the state courts against all claimants to the fund. That action was removed to the United States District Court, for the District of Nebraska.

In the meantime, a creditor of the Olsons holding mortgages against the real estate of the Olsons filed a foreclosure action in state court. The plaintiff in the main foreclosure action obtained an order of appointment of receiver in March

of 1984. The receiver took possession of the property and managed it pursuant to state court order. The mortgage holders obtained a judgment of foreclosure and the debtors, rather than appealing the court decision took the statutory nine-month stay of the order of sale. After the expiration of the state law stay and just prior to the sheriff's sale of the real estate, debtors filed this Chapter 11 petition on May 1, 1985.

During the pendency of this case, the land has been sold. But the proceeds of the sale have not been sufficient to pay the outstanding claim of one of the mortgagees, Prudential Life Insurance Company of America (Prudential).

After the current bankruptcy case was filed, the District Court referred the Overland National Bank case to the

Bankruptcy Court. After notice and a hearing, Overland was permitted to pay into the registry of the Clerk of the Bankruptcy Court all funds which it held and it has been excused from this proceeding. The only parties to the proceeding now are the Internal Revenue Service, Prudential, the lawyers for the Olsons in the first bankruptcy case, and the Olsons as debtor-in-possession.

With that background, the following numbered items are a chronology of the activities during the 1982 case and the "lien perfection" activities following the dismissal of the 1982 case.

1. On October 4, 1978, Theodore V. Olson ("Olson") and Sandra A. Olson executed a $1,000,000 Installment Note (the "Note") in favor of the Prudential Insurance Company of America

("Prudential").

2. On October 4, 1978, the Olsons executed a Mortgage to Prudential (the "Mortgage") which was a first mortgage lien on 1,280 acres of real estate owned by the Olsons (the "Real Estate"). The Mortgage provides that "the conveyance of the premises together with all the rents, issues and profits ... is made to secure repayment of a loan ... as evidenced by [the Note]...."

3. On March 1, 1982, the Olsons filed a Voluntary Proceeding under Chapter 11: Joint Petition ("Olsons' Petition") in the United States Bankruptcy Court for the District of Nebraska.

4. As of March 1, 1982, the 1981 real estate taxes on the Real Estate in the amount of $5,764.36 were unpaid. The

1980 Nebraska real estate taxes due December 31, 1980 and the first half became delinquent May 1, 1982 and the second half became delinquent September 1, 1982.

5. Heinisch & Bryan Law Offices, William L. Needler & Associates, Ltd. and Berry, Anderson, Creager & Wittstruck represented Theodore V. Olson and Sandra A. Olson in connection with their 1982 Chapter 11 proceedings.

6. On August 12 ,1982, Prudential filed a Proof of Claim in the Bankruptcy Court asserting its secured claim against Olsons in the amount of $1,140,071.10 plus accruing interest, costs and attorneys' fees.

7. On September 3, 1982, Prudential filed a Motion for adequate protection in the Bankruptcy Court asserting a right to

and seeking to sequester the rents, issues and profits of the Real Estate, which it renewed in subsequent pleadings filed on October 15, 1982, January 3, 1982 and February 23, 1983.

8. Olson produced the 1982 corn crop after the filing of the Chapter 11 proceedings, and Olson thereafter sealed the 1982 corn crop under a federal government farm stored feed grain reserve program pursuant to orders of the Bankruptcy Court.

9. The 1982 corn crop was produced on 3,348 irrigated acres on twenty-eight (28) quarters (three quarters were left idle under a government set-aside program) of Holt County, Nebraska, farm ground in which the ownership first liens and 1982 corn production in bushels computed from weight are as follows:

	Lender	Owner
1.	Hancock	Theodore V. and Sandra
2.	Hancock	Theodore V.
3	Prudential	Theodore V.
4.	Engler	Theodore V.
5.	Keidel	Theodore V.
6.	Lange Rental	Theodore V.
7.	Vincent Rental	Theodore V.

	Production	% of Total
1.	159,683.741	36.37%
2.	82,338.282	18.75%
3.	117,982.699	26.87%
4.	9,055.780	2.06%
5.	12,527.985	2.85%
6.	38,478.079	8.76%
7.	19,031.261	4.33%
T	439,097.807	100.00%

10. The percentage of the 1982 corn crop produced from the Real Estate subject to the Mortgage by Prudential was approximately 26.87%.

11. On January 27, 1983, the Bankruptcy Court ordered that, inter alia, the liens of all claimants to the 1982 corn crop be transferred to the

proceeds of the 1982 corn crop proceeds of the 1982 corn crop (interpleaded Fund): the 1982 corn crop proceeds be deposited in escrow with interest and any entity or individual with a claim to the 1982 corn crop proceeds make application for payment by February 25, 1983. Neither the Olsons' Lawyers nor the United States made a claim to the Interpleaded Fund on or before that date.

12. On February 24, 1983, Olson executed an Escrow Agreement (the Escrow Agreement) with the Overland National Bank of Grand Island (Overland) requesting that Overland act as escrow agent to the 1982 corn crop proceeds. Prudential, O'Neill Production Credit Association (PCA), John Hancock Life Insurance Company were "consenting parties" and signatories to the Escrow

Agreement. The Escrow Agreement provided that no distribution could be made, except by order of the Bankruptcy Court or as agreed by the Olsons and the consenting parties.

13. On April 13, 1983, Bankruptcy Judge Stageman issued an order relating to claims to the Interpleaded Fund.

14. On May 5, 1983, Prudential filed a Motion to Dismiss Olsons' bankruptcy reorganization case.

15. On December 15, 1983, during the pendency of Theodore V. Olson's first bankruptcy case, the IRS assessed a 100% penalty under Section 6672 of the Internal Revenue Code against Theodore V. Olson.

16. On January 27, 1984, Bankruptcy Judge Stageman granted Prudential's Motion to Dismiss. Judge Stageman's

Order dismissing Olsons' bankruptcy case was appealed to the United States District Court for the District of Nebraska and the Order was affirmed. No appeal was taken of the District Court's Order.

17. On February 6, 1984, the United States filed a Notice of Federal Tax Lien with the Register of Deeds of Holt County, Nebraska. At that time, Olson was a resident of Holt County, Nebraska.

18. On February 17, 1984, O'Neill PCA, a junior mortgagee, filed a Petition of Foreclosure and Application for Appointment of Receiver (Foreclosure Action) relating to the Real Estate in the District Court of Holt County, Nebraska. In this Foreclosure Action, a state court receiver was appointed.

19. On February 24, 1984,

Prudential filed a Notice of Appearance in the Foreclosure Action.

20. On March 16, 1984, Olsons' Lawyers obtained a judgment against Theodore C. Olson in the District Court for Filmore Country, Nebraska in the amount of $359,030.33 plus $50.00 in costs and interest at fourteen percent and transferred the judgment to Hall County District court on June 18,1984. A summons in Garnishment was issued against Overland National Bank on or about June 20, 1984. No payment has been made on the judgment.

21. On April 2, 1984, Prudential filed its Answer and Cross Petition in the Foreclosure Action.

22. On June 20, 1984, a Decree of Foreclosure was entered in the Foreclosure Action and the Court

determined that Prudential held a first mortgage lien of the Real Estate.

23. On July 27, 1984 Overland filed this interpleader action (Overland Interpleader Action relating to the Interpleaded Fund which action was removed to the United States District Court for the District of Nebraska.

24. On September 20, 1984, Olsons filed an Answer in the Overland Interpleader Action acknowledging that other claimants held a valid claim to the Interpleaded Fund.

25. On October 10, 1984, Prudential filed an Answer and Cross Claim against Olson in the Overland Interpleader Action affirmatively alleging a superior interest to Olsons in the Interpleader Fund.

26. On May 13, 1985, Theodore and

Sandra Olson filed for relief under Chapter 11 of the Bankruptcy Code. Robert Creager represents the debtors in the present Chapter 11 proceedings. Olsons' Lawyers do not represent the debtors in this bankruptcy case.

27. On July 2, 1985, Olsons filed a Notice of Bankruptcy and Automatic Stay requesting the Overland Interpleader Action be stayed until disposition of his Chapter 11 bankruptcy case.

28. On July 8, 1985, the United States District Court for the District of Nebraska transferred the Overland Interpleader Action to the Bankruptcy Court for disposition as an adversary proceeding in Olsons' Chapter 11 bankruptcy case.

29. On July 31, 1985, after Relief From the Automatic Stay was granted, an

Order Confirming Sale of four quarter sections from a total of eight quarter sections of Real Estate under the Mortgage held by Prudential was entered by the District Court for Holt County, Nebraska, indicating a sale to prudential in the amount of $368,000.

30. On January 17, 1986, an Order confirming sale of the remaining four quarter sections of the Real Estate under the Mortgage held by Prudential was entered, indicating a sale to Prudential in the amount of $464,000.

31. On November 6, 1986, the United States filed a Stipulation stating that Prudential's interest in the Interpleaded Fund is superior to the United States' claim and to all other claimants' interests in the Interpleaded Fund.

32. On August 21, 1987, Robert

Creager filed a Stipulation stating that Prudential's interest in the Interpleaded Fund is superior to Creager's interest in the Interpleaded Fund.

33. The claim of the United States is based on its Federal Tax Lien as perfected by Notice of Federal Tax Lien filed with the Register of Deeds of Holt County, Nebraska on or about February 6, 11984. When the United States filed its Notice of Federal Tax Lien, the Debtor, Theodore V. Olson, was a resident of Holt County, Atkinson, Nebraska, and the Debtor continues to reside in Holt County as of the date of this Order. The Notice of Federal Tax Lien filed by the United States was filed in connection with a federal tax assessment made against Theodore V. Olson. The Internal Revenue Service entered an assessment against

Theodore V. Olson in the amount of $184,220.96, exclusive of interest pursuant to I.R.C. par 6672 (Section 6672 assessment). Such assessment was made in December, 1983, during the original bankruptcy case. The Section 6672 assessment was not made against Sandra Ann Olson.

34. The Section 6672 assessment relates to federal employment withholding taxes and the employees' portion of Federal Insurance Contributions Act (FICA) taxes owed by OBM. These taxes, which were required to be withheld by OBM and remitted to the United States are referred to as "Trust Fund" taxes. The Trust Fund taxes owed by OBM are for the quarter periods April 1, 1980 through December 31, 1980. The issue of Theodore V. Olson's liability for the Section 6672

assessment has been tried to the Bankruptcy Court and by memorandum filed June 3, 1988, the Court found him to be a responsible person whose failure to require the company to pay the "Trust Fund" taxes was willful.

35. This Court has jurisdiction over the interpleaded Fund and the competing lien claims of the parties as to those funds.

36. The Interpleaded Fund includes proceeds from a 1982 corn crop produced by Olson on the Real Estate.

37. The United States claims a superior lien interest in all the interpleaded funds remaining after satisfaction of Prudential's secured interest.

38. Prudential claims a superior lien interest in all the interpleaded

funds arising from crops raised on the Real Estate.

39. Olson' Lawyers claim a superior lien interest in all the interpleaded funds.

40. Olsons claim all of the interpleaded funds not otherwise subject to any other claim entitled to priority ahead of their interest.

Findings Regarding Specific Claims

A. Claim of Prudential

Prudential maintains that is has a valid claim against the fund because of its mortgage on the Olson property. The Prudential mortgage, as indicated in the agreed statement of facts recited above, contains a "rents and profits" clause. In September if 1982, Prudential filed a motion with the Bankruptcy Court requesting the Court to sequester rents

and profits resulting from the use of the real estate upon which Prudential held a mortgage. The Bankruptcy Court denied Prudential's request on April 13, 1983. Prudential did not appeal that denial. Other secured parties had also requested sequestration pursuant to the terms of their mortgages. Their motions were also denied and on appeal to the District court it was determined that the order denying sequestration of rents and profits was interlocutory in nature and the District Court would not entertain the appeal.

On March 1, 1982, the date the first bankruptcy case was filed, the Prudential mortgage was not in default. All annual payments had been made and the next annual payment was due on April 1, 1982. Taxes had been assessed but were not

delinquent until May 1, 1982. The value of the real estate subject to the mortgage was, according to the schedules filed by the debtor, in excess of the debt due to Prudential. Such valuation was supported during this trial by testimony of Mr. Olson which was based on an appraisal he had obtained prior to March 1, 1982.

In this trial, Prudential presented evidence that in May of 1982 an appraisal was completed which determined that the "liquidation value" of the real estate was less than the debt. However, Mr. Shonka, the appraiser, also testified that he did not consider "liquidation value" to be the same as fair market value and he had no opinion of the fair market value in May of 1982 or at any other time. He did, however, testify

that land values in 1982 were declining at the approximate rate of one percent per month.

Prior to bankruptcy, since there had been no default, Prudential had not commenced a foreclosure action in the state courts.

In August of 1982 Prudential filed a motion to sequester rents and profits. The Bankruptcy Judge made no findings of fact concerning the value of the real estate subject to the mortgage at the time the motion was filed. Instead, eight months later, the Bankruptcy Judge denied the motion as a matter of law. He determined that the "rents and profits clause" in a mortgage could be invoked outside of bankruptcy but only by a certain procedure and only under certain circumstances. Under Nebraska law, a

mortgage holder has a lien upon the "rents and profits" only if a mortgage foreclosure action is started, a request for a receiver is made, a state court makes a determination that the value of the real estate is probably less than the amount of the debt and the state court then appoints the receiver. The lien of the mortgagee attaches to rents and profits from that day forward. Saline State Bank v. Mahloch, 834 F. 2d 690, 693 (8th Cir. 1987). The Bankruptcy judge determined that since there had been no default prior to bankruptcy and no foreclosure proceeding commenced or receiver appointed prior to bankruptcy, under Nebraska law the mortgagee had no right to the rents and profits and the motion to sequester rents and profits did not perfect any lien in the rents and

profits.

[1] Subsequent decisions of the United States District Court for the District of Nebraska and of the Eighth Circuit attempt to clarify the law in this area. A district court decision, In re Anderson, 50 B.R. 728 (D. Neb. 1985), determined that a postpetition motion to sequester rents and profits was appropriate to enable a mortgagee to maintain the equivalent of the rights it had prior to bankruptcy and could enforce in that state court system outside of bankruptcy. Then, the Saline State Bank v. Maloch decision in 1987, 834 F. 2d at 694 summarizes the procedure required before a lien is perfected in rents and profits.

An analysis of Nebraska cases to date clearly demonstrates that it is only

upon default that the assignment clause of the security agreement becomes an equitable lien. Thereafter, Nebraska law requires affirmative action on behalf of the lienholder to perfect such lien. (Perfection of such equitable lien can occur only if the mortgaged property is insufficient to discharge the mortgage debt. Mahloch, 834 F., 2d at 692.

The Mahloch court was dealing with a set of facts which left no doubt that the land secured by the mortgage was insufficient to pay the debt. It, therefore, had no problem in holding that "Saline did not have a lien until their interest was fully perfected, i.e. by filing a petition to sequester rents and profits Id.

[2] In this case, in contrast to the Mahloch case, there is a significant

dispute about the value of the real estate in August of 1982. The Bankruptcy Judge, in 1982, relying upon Nebraska statutes and case law, made the decision that Prudential was not entitled to sequestration of rents and profits as a matter of law. He made no factual findings concerning the value of the property or the default. Prudential has, in this case, strenuously argued that the Anderson and Mahloch cases decided in 1985 and 1987 should be considered retroactive to 1982 and that this Court should apply the rule of law determined in those cases to the facts in this case. Assuming without deciding, that the rule of law eventually articulated by the United States District Court and the Eighth Circuit Court of Appeals concerning this issue would somehow be

retroactive to affect the rights of debtors and creditors in a 1982 bankruptcy case that was dismissed in 1984, this Court still finds Prudential's position unpersuasive.

First the Bankruptcy Judge presiding over the case in 1982 declined to grant the motion sequestering rents and profits. Therefore, whether he was in error or not, Prudential, in that case, did not obtain a lien. The decision of the Bankruptcy Court was not appealed.

Second, there were no factual determinations made concerning the value of the real estate on the date the motion was filed or on the date the decision was filed. Therefore, it is only with the benefit of seven years' of hindsight that this Court could make a determination of the value of the property in August of

1982 or April of 1983.

Third, the case was dismissed in January of 1984. Assuming that Prudential is correct and that the recent federal court determinations of the perfection of a lien post petition by filing a motion to sequester rents and profits are retroactive, and assuming that the land value in 1982 was insufficient to pay the debt, Prudential obtained a lien on the rents and profits in August of 1982 or April of 1983. When the case was dismissed in January of 1984, it is at least arguable that the post-petition lien granted in that case was dissolved by virtue of Section 349 of the Bankruptcy Code. Section 349(b)(3) states, in pertinent part: "Unless the court, for cause, orders otherwise, a dismissal of a case ... revests the

property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title." Such a revesting could have the effect of setting aside the post-petition lien and leaving Prudential to its state law remedies.

The legislative history of Section 349(b), according to the House and Senate Reports, is that "the basic purpose of the subsection is to undo the bankruptcy case. As far as practicable, to restore all property rights to the position in which they were found at the commencement of the case." H.R. Rep. No. 595, 95th Cong., 1st Sess. 337-38, S. Rep. No. 989, 95th Cong., 2d Sess., 48-49 reprinted in 1978 U.S. Code Cong & Admin. News. pp. 5787, 5835, 6294.

Fourth, there is the legal issue which could be dispositive. Prudential has asked the Court to focus on the real estate aspects of this matter and to assume that it obtained a lien on this fund which represents proceeds of the 1982 corn crop, by moving to sequester "rents and profits." However, an analysis of the factual and legal situation based upon the Nebraska Uniform Commericial Code would result in a decision opposite that desired by Prudential. For example, in August of 1982 the property which Prudential claimed a lien upon was actually a growing crop. Growing crops are personal property under the Uniform Commercial Code in that they are defined as goods. Neb. U.C.C. 9-105(h). A security interest is not enforceable against the

debtor, according to the Uniform Commercial Code, and does not attach unless the debtor has signed a security agreement which covers crops growing or to be grown. Neb. U.C.C. 9-203(1)(a).

It seems, therefore, that there is a tension between the rights of a mortgagee claiming a lien on "profits" and the rights of a debtor-in-possession with the powers of a trustee to avoid such lien under Bankruptcy Code Section 544. Outside of bankruptcy, there is authority that when such tension arises between an interest in real estate and an interest in crops or the proceeds of crops, the Uniform Commercial Code is applicable. United States v. Newcomb, 682 F. 2d 758 (8th Cir. 1982).

Finally, although some evidence was presented in this trial that the value of

the real estate as of August of 1982 was insufficient to pay the debt, such evidence is unpersuasive. Mr. Shonka, Prudential's appraiser, testified that land values during the period were declining approximately one percent per month. He testifies with the benefit of hindsight. This Court is not convinced that Mr. Shonka's evidence would have been presented to Judge Stageman or would have been convincing to Judge Stageman in August if 1982, This Court does not believe it appropriate to use the benefit of hindsight to reach back to a date in 1982 and make factual findings concerning the value of real estate on such date, for the sole purpose of coming to a legal conclusion at odds with that of the presiding judge in 1982. Evidence from Mr. Olson, which was in the court file in

1982, including Mr. Olson's schedules, which were based on a prepetition appraisal and his current testimony convince the Court that in August, 1982, the value, although declining, had not decreased below the debt.

For all of the legal and factual reasons recited above, this Court declines to find that Prudential has any lien interest in the proceeds in the 1982 corn crop.

B. Claim of the Lawyers.

The Olson Lawyers claim an interest in the fund on the theory that during the 1982 case they performed necessary legal services which enabled the debtor to plant, maintain and harvest the 1982 corn crop. It is thus their position that the 1982 corn crop and its proceeds are the result of their efforts

and under the Nebraska Attorney Lien Statute, Neb. Rev. Stat. par. 7-108 (Reissue 1987), they should be compensated for their service from this fund. That Nebraska statutory section reads as follows:

> An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party.

During the fall of 1982 the corn crop was harvested and the debtor requested authority to seal the crop pursuant to the government farm program in effect at that time. Judge Stageman granted the authority to participate in the program and granted the ASCS a lien in the 1982 crop in consideration for a

crop loan under the government program. The Judge also required that the money from the loan be deposited in an escrow account at interest. That escrow account which was set up by the debtor at Overland National Bank of Grand Island and consented to by Prudential is the source of the funds which are the subject of this litigation.

The escrow agent was independent from any of the parties to this case and, by agreement of the parties and order of the Court, was prohibited from distributing any of the funds unless ordered by the Court or unless all of the parties to the escrow agreed. The Internal Revenue Service was not a party.

The lawyers suggest that as a matter of fact the escrow agent was an adverse party to both the debtor and the lawyers

because it was charged with holding funds resulting from the 1982 corn crop and was prohibited from permitting those funds to be distributed without unanimous agreement of the parties or order of the Court. Therefore, according to the lawyers, the various elements necessary for the lawyers to qualify under the Nebraska Attorney Lien Statute were satisfied.

The lawyers also claim an interest in the fund based upon a judgment lien. After the bankruptcy case was dismissed in January of 1984, the lawyers obtained a judgment against the debtor, Theodore V. Olson, for their fees. Following entry of the judgment, the lawyers attempted execution on the fund held by Overland National Bank of Grand Island by a garnishment proceeding. The lawyers

thus argue that they have a judgment and a perfected lien against the fund as a result of following the statutory procedures.

There is no question that the lawyers acted vigorously in both an offensive and defensive posture on behalf of the debtor/debtor-in-possession during the 1982 case. The Court finds as a fact that the 1982 corn crop would not have been even planted by the debtor-in-possession but for the efforts of the lawyers. Prudential and other creditors fought the lawyers at every turn. They attempted to get the Bankruptcy Judge to prohibit the planting of the crop, to prohibit the obtaining of secured or unsecured credit to plant and maintain and harvest the crop. They moved to sequester rents and profits and they

moved for relief from the automatic stay. They took action in the state courts to replevin the equipment which was necessary for the farming operation. The debtors, because of the legal efforts of the lawyers, were successful in producing a 1982 crop, paying the secured and unsecured suppliers and turning the crop into actual cash soon after harvest. However, what the lawyers are asking this Court to do is determine that the fees which were incurred in the 1982 case, but never allowed by the Bankruptcy Court, are reasonable, appropriate, of benefit to the estate, and allowable in support of a state law attorney lien or judgment.

[3] The lawyers provided legal services to the debtor and were successful in aiding the debtor to stay in existence long enough to produce the

1982 crop. They also helped the debtor to get Court approval for participating in the government grain programs and obtaining a government loan which is the source of the fund. However, no matter how hard they worked and no matter what they did, the lawyers did not obtain either a judgment or settlement nor did they create a fund to which an attorney lien could attach.

The debtors planted and tended the crops and harvested the crops. The debtors signed the appropriate loan forms with the government entity to obtain loan proceeds which are now the subject of this dispute.

Neither at the time that the 1982 crop was produced nor at the time the loan funds were escrowed nor at the time the case was dismissed did the lawyers

have a reasonable expectation that the fund should or could be used as a source of payment of their fees. At the time of harvest and escrow, the lawyer fees had not been allowed to the extent that the lawyers now desire to be paid. The lawyers did not file any claims against the fund at any time during the 1982 bankruptcy case. Upon dismissal of the case, the lawyers requested the Bankruptcy Judge to reconsider the dismissal and protect their fees. The motion to reconsider was lengthy and directly alerted the Bankruptcy Court to the problem the lawyers anticipated concerning their fees if the case was dismissed. They anticipated that there would be no fund available for payment and that all of the work that they had performed during the case would go unpaid

because the debtor would have no source of payment. The Bankruptcy Judge overruled the motion to reconsider and the District Court affirmed the dismissal. Neither the Bankruptcy Judge nor the District Court made any provision for attorney fees nor did they acknowledge any lien in favor of the attorneys against property of the estate or this fund in particular.

The Overland National Bank of Grand Island was not an adverse party. It held funds pursuant to Court order, just as the Clerk of the Bankruptcy Court could be ordered to hold funds subject to contested claims. Such Court order does not create an adversarial relationship between the holder of the funds and the parties to the funds. Therefore, the Court concludes as a fact that the

lawyers did not create the fund and that the lawyers were not in an adversarial posture with the escrow agent. Therefore, no attorney lien attaches under Nebraska law.

The lawyers then argue that as a matter of equity, their fees should be allowed a lien status against the fund. This Court rejects such argument. The lawyers may have had an administrative claim in the 1982 bankruptcy case. Upon dismissal of the case, their claim for fees simply becomes an unsecured claim against the debtor who promised the payment. The promising payor was Theodore V. Olson. Lawyers have an unsecured claim against Mr. Olson in the current case.

(4) The lawyers do not have perfected judgment lien against the fund,

first of all because a good portion of the funds is the property of Sandra Olson, against whom there is no judgment. Second, the lawyers' attempt to perfect the judgment lien against the fund was unsuccessful under Nebraska law. The garnishee bank answered the garnishment to the effect that it did not know if it held funds of Theodore V. Olson because of the court-ordered escrow fund, IRS levy and other claimants. The Lawyers did not proceed further under the state statutes, Neb. Rev. Stat. par 25-1056, 25-1011, 25-1026 to 25-1031.01, for a determination of ownership. Instead the bank filed this action. As a result, no judgment lien attached.

This Court has reviewed the attorney fee itemization of time, expense and services rendered. The Court has not

been requested to make a determination of the allowability of the attorney fees as an administrative expense under Sections 327 through 330 of the Bankruptcy Code. The issue before the Court concerning the attorney fees is a result of the dispute between the Internal Revenue Service and the lawyers over the priority of liens, if any. Since the Court finds that the lawyers do not have a lien against the fund, the Court does not need to make any findings concerning the reasonableness of the fees or the benefit to the estate.

C. Claim of the United States.

The United States claims a priority interest in the fund based on federal tax liabilities owed by Theodore V. Olson which were assessed pursuant to Section 6672 of the Internal Revenue Code. In an earlier trial on some of these matters,

this Court assuming the validity and efficacy of the assessment process, found that Mr. Olson was a "responsible person," pursuant to Section 6672 of the Internal Revenue Code (26 U.S.G. par 6672) with respect to the trust fund liabilities of OBM for the quarter periods ending September 30, 1980 and December 31, 1980. See Memorandum Opinion dated June 3, 1988.

The matters before the Court now concern the merits and priority of the respective lien claims, including calculation of the tax liability. The lien status of the claim is based upon an assessment made in 1982 during the pendency of he first Olson bankruptcy case. During the trial, the Court requested the parties to brief the issue of the validity of the assessment which

was made during the pendency of the first bankruptcy case. The United States has responded first that this Court has no jurisdiction to consider actions which took place during the 1982 bankruptcy case and which may have violated the automatic stay in that case because the particular case was dismissed and the Court did not retain jurisdiction to consider the effect of matters which occurred during the case. Second, the United States argues that since the case was dismissed, the assessment is still in place and should be recognized by the Court during this bankruptcy case. Third, the United States suggests that the assessment, although perhaps in violation of the automatic stay, is or was voidable during the 1982 case, but was not then and is not now void.

Finally, the United States urges this Court to consider the validity of the assessment based upon the equities of the case. That is, no party had raised the issue of the validity of the assessment during the 1982 case and no party raised it during this 1985 bankruptcy case until the Court raised it on its own motion during the trial of these issues. Therefore, argues the United States, the Court should simply determine that the unchallenged status of the assessment makes it valid and provides the United States with a lien against the fund in question.

[5] With regard to the first argument made by the United States, this Court believes that the dismissal of the 1982 case does not validate the assessment made during the case in

violation of the automatic stay. As discussed earlier in this memorandum, the dismissal of a bankruptcy case puts the parties, to the extent possible, in the same position they were in prior to bankruptcy. Prior to the 1982 bankruptcy petition being filed, the Internal Revenue Service, although it had the right to assess the 6672 penalty, had not performed the assessment. Therefore, the dismissal, rather than validating and continuing the post-petition assessment, could have the opposite effect and put the parties in their pre-petition status, even assuming that an assessment made in violation of the automatic stay is not absolutely void.

The fact that Judge Stageman did not retain jurisdiction to deal with actions of the Internal Revenue Service in

violation of the automatic stay does not impact upon the assessment or its validity.

[6] The next question is whether or not the assessment taken or made during the 1982 bankruptcy case in violation of the automatic stay is void or simply voidable and further, if it is voidable, should this Court exercise its equitable powers to ratify or validate the action of the Internal Revenue Service. There is authority for either position. The Bankruptcy Court in the case of In re Coleman American Cos., Inc., 26 B.R. 825 (Bankr. D. Kan. 1983) and the Circuit Court concerning the bankruptcy case of In re Ward, 837 F. 2d 124, 126 (3rd Cir. 1988) both make very strong statements that violations of the automatic stay are void. Such position is supported by the

editors of the noted commentary 2 Collier on Bankruptcy, par 362.03. (15th ed. 1989). See also In re H&H Beverage Distribution, 850 F. 2d 165 (3rd Cir. 1989). To the opposite effect are cases such as In re Oliver, 38 B.R. 245 (Bankr. Minn. 1984); Alegran, Inc., v. Advance Ross Corp., 759 F. 2d 1421, 1424-1425 (9th Cir. 1985); In re Albany Partners, Ltd., 749 F. 2d 670, 675-679 (11th Cir. 19840); In re Lee, 40 B.R. 123. 126-127 (Bankr. E.D. Mich. 1984).

This Court believes that it is a better policy determination, considering the administration of bankruptcy cases, to interpret the automatic stay of Section 362 of the Bankruptcy Code to mean that actions that are taken in violation of the stay are void, as the courts in Coleman and Ward and H&H and

Marine Pollution Services have determined. If creditors believe that there is a legitimate possibility that their intentional actions post petition in violation of Section 362 may be ratified later by a court "weighing the equities," creditors will be encouraged to take the action and hope for the best result later.

There is no question in this case that the Internal Revenue Service made the Section 6672 assessment against Theodore V. Olson during his bankruptcy case and without requesting relief from the automatic stay. Such assessment is an act against the debtor that could have been commenced before the bankruptcy petition was filed. It is also an act to recover a claim against the debtor that arose before the commencement of the

case. In addition, it is an act to create a lien against property of the estate or the debtor. Finally, it is specifically an act to assess a claim against the debtor that arose before the commencement of the case. Each of those types of actions are specifically prohibited by Section 362(a)(1), (4), (5) and (6). To permit such act to eventually be ratified or validated by the Bankruptcy Court either in the original case or in this case, would enable the United States to step ahead of all other creditors with the same pre-petition unsecured type of claim. It seems to this Court that the whole purpose of the automatic stay of Section 362 is to eliminate the "race to the courthouse" and to permit claimants to be treated according to the classification

system and priority system incorporated into other provisions of the Bankruptcy Code, as their individual rights exist of the petition date.

[7] Assuming the correctness of the position of the United States concerning the void versus voidability issue, the Untied States have given this court no reason to ratify the assessment which took place in violation of the automatic stay during the 1982 case. It appears that the assessment was made in violation of the automatic stay without any individual in the Internal Revenue Service intending to violate the Bankruptcy Code. However, as Judge Pusateri suggested in the Coleman decision, just because the Internal Revenue Service is a large administrative agency with employees in various parts of

the nation and computers which operate without regard to the constraints imposed by the bankruptcy system, the court is not compelled to give special treatment to the actions by the Internal Revenue Service. In re Coleman American, 26 B.R. at 831.

The United Sates suggests that the assessment was not challenged in the 1982 case and was not challenged by any party during the 1985 case before this Court raised the issued of its validity. Therefore, the United States argues that it would somehow be prejudiced if this Court found that the assessment was improper and that the United States had no lien against the specific fund. The suggestions of the United States are without merit. If the assessment was made in violation of the automatic stay,

it is void.

On the other hand, if the legal standard is not "void" but is "voidability." the United States has given no compelling reason for ratifying an act that the United States took in violation of the federal Bankruptcy Code. All parties to the 1982 case and to the 1985 case should assume or should be permitted to assume that the Bankruptcy Code is the statutory framework within which each of the claimants must operate. To permit the United States, by virtue of the illegal act of the Internal Revenue Service, to obtain a lien against a specific fund of money owned by the debtors to the detriment of all other creditors of the debtor, is simply not fair. If voidability is the legal standard, this Court declines to ratify

the act of the Internal Revenue Service and hereby voids such act.

Without a valid assessment, the Internal Revenue Service has no lien and the filing of its lien documents in February of 1984 are of no effect. In conclusion, the Court finds that the Internal Revenue Service does not have a lien against the escrowed fund.

The ownership of the fund is in the debtors because such fund is a result of their efforts in 1982 and the property is their property, now subject to use and disbursement in accordance with the Bankruptcy Code.

It was agreed by the parties and ordered by the Court that the decision rendered in the first part of this case concerning the validity and extent of the penalty imposed upon Theodore V. Olson

would not be a final order for appeal purposes until the issue of priority in the fund was decided. With the filing of this opinion, the order of June 3, 1988 and the order in this matter are final and appealable. Since the Court has determined that the United States does not have a valid assessment and, therefore, no lien against the fund, some of the findings in the June 3, 1988, memorandum might be inapplicable. That order was entered on the assumption that the United States had a valid assessment and, therefore had a valid reason to claim a priority in the fund.

However, other factual and legal issues concerning the right of the Internal Revenue Service to allocate corporate tax payments in a manner beneficial to the Government and adverse

to the "responsible party" will now be addressed in this opinion.

Based upon the findings made above, the United States now has a claim against Theodore V. Olson based upon the Internal Revenue Service determination and this Court's finding that Mr. Olson was a responsible party for purposed of Section 6672 of the Bankruptcy Code and that his failure to ensure that the "trust fund" taxes of OBM were timely paid. One of the issues litigated was the amount of the claim of the United States and the validity of the process used by the United States to determine that amount. Prior to the first bankruptcy case filed by Theodore and Sandra Olson, Mr. Olson was president of OBM. In 1980, OBM had employees and had incurred "trust fund"tax obligations. OBM paid to the

Internal Revenue Service certain payments during the first three weeks of July, 1980. It did not make additional payments during the second quarter of 1980. It filed the official government report (Form 941) reflecting payments due and payments made during the second quarter. The report that it filed showed that it had paid to its employees a certain amount of wages during each pay period of the quarter and that during the first three weeks of July, it had deposited with the Internal Revenue Service an amount equivalent to the "trust fund" taxes due plus the matching amount due from the corporation relating to trust fund obligations. When an employer has employees, it is required to withhold from the employees' gross pay a certain amount for employee income taxes

and a certain amount for social security and other federal employment taxes. The employer is required to match the amount withheld from the employee for social security and deposit the total with the Government on a regular basis.

The report filed for the third quarter of 1980 (July, August, September, 1980) appears on its face to show that the corporation complied with the law with regard to the first three weeks of the quarter. However, in late 1983 when the Internal Revenue Service was calculating the 6672 penalty to assess against Mr. Olson, it treated all of the payments made during July as if they were made by the employer to over its matching obligation and none of the payments were made to cover the employee withholding or social security obligations. The effect

of this treatment is to increase the penalty for which Mr. Olson is liable as a responsible person under the Internal Revenue Code.

OBM continued to operate outside of bankruptcy until December 19, 1980. From the middle of July until the first of December, 1980, it had employees and paid wages. However, it did not pay any withholding monies to the Internal Revenue Service nor did it pay any trust fund taxes or matching funds to the Internal Revenue Service. On December 1, 1980, the company was without funds to make any payroll payments. Some employees were still at work but all financing for the operations had been shut off by the lender. On December 10, 1980, the company filed Chapter 11 bankruptcy. Theodore V. Olson remained

as president and the company operated as debtor-in-possession for a short period of time. During the last two weeks of December, 1980, the company had employees and paid wages for the employees. Mr. Olson personally funded the payroll amounts and the Form 941 which was eventually filed to report on the trust fund and matching payments indicates that during the last two weeks of December of 1980 all employment tax obligations were made by the company to the IRS.

Mr. Olson was removed as president of the company in early January, 1981. A trustee was appointed. The trustee completed the Form 941 and showed on that form that wages were actually paid during the first two weeks of December 1980, and during the last two weeks of December 1980 and that the appropriate tax

payments were made for the last two weeks. The trustee did not indicate on the form that bankruptcy was filed on December 10, 1980 and did not file a separate Form 941 for the pre-petition and post-petition tax obligations.

In late 1983 when the Internal Revenue Service was determining that Mr. Olson was a responsible party and preparing of the assessment process, it applied the payments made to the Internal Revenue Service after the bankruptcy to the pre-bankruptcy non-trust fund obligations of the company for the last quarter of 1980. In other words, it did the same thing with the last quarter as it did with the third quarter and, by so doing increased the eventual obligation of Mr. Olson for all of the trust fund taxes. However, with regard to the

fourth quarter, in addition to simply making the particular application of the payments in a manner favorable to the Internal Revenue Service, it applied taxes paid post petition to pre-petition obligations.

Mr. Olson had no control over the company after the trustee was appointed and had no access to the records and no ability to supervise, prepare, sign or object to the form which was filed by the trustee and which erroneously indicated wages were paid during the first two weeks of December of 1980. Mr. Olson's testimony that no wages were paid during the first two weeks of December, 1980, is unrebutted. It is also consistent with this Court's findings that the lender had shut down the cash flow as of the end of November, 1980. Those findings were made

in the memorandum filed June 3, 1988.

Although there is no valid assessment, the United States has filed a claim which is prima facie evidence of its validity. See Bankr. R. 3001(f). It is the burden of the taxpayer to go forward with evidence and make a showing contrary to the validity of the claim. It is then the burden of the claimant to convince the Court that its claim is valid. Mr. Olson has met his burden. He has shown that during July of 1980 the company was in compliance with the law and paid all of the taxes it owed, whether trust fund or not, for the first three weeks. He has shown and the United States has not rebutted or presented any contrary evidence that the company did not make any payroll during the first half of December , 1980. he has shown

that the company filed bankruptcy on December 10, 1980, and that he personally loaned the company money to make the payroll for the last half of December, 1980, and to make the tax payments both for trust fund taxes and the company matching taxes.

The United States does not seem to dispute those facts that this Court has just found, but takes the position that even assuming all of those facts are correct, the Internal Revenue Service has a right to apply payments to its advantage to ensure that it will be able to collect trust fund taxes from the responsible person. This is a legal issue and will be discussed in two parts.

First, the analysis must focus upon the validity of the process of applying post petition tax payments for payroll

periods during the last half of December, 1980, to non-trust fund tax obligations of the company incurred prior to December 10, 1980, the bankruptcy petition date. The IRS has presented no evidence and no convincing legal argument that there is any statutory or case law authority for such application. The bankruptcy trustee filed the quarterly report relied upon by the Government. The report did not break down payroll and taxes paid pre-petition from payroll and taxes paid post-petition. The IRS, when computing the penalty against Mr. Olson in 1983, paid no attention to the fact that the taxes paid after December 10, 1980, were taxes paid by a debtor-in-possession for post-petition payroll. It treated those tax payments as if they were made by the debtor company outside of bankruptcy and

it, therefore, applied the payments as if no bankruptcy had occurred. This process significantly increases the claim of the Government against Theodore V. Olson for the trust fund taxes. This Court finds such a practice to be legally unjustifiable and factually unfair.

[8] On December 10, 1980, when the bankruptcy petition was filed for OBM, a new entity came into existence. The Internal Revenue Service had no right to apply tax payments made post petition to pre-petition obligations, trust fund or otherwise. Since it could not do that with regard to the obligations of the company, it, therefore follows that the taxes paid by the company for the last half of December, 1980, must be recognized by the Internal Revenue Service and applied in the manner in

which they were reported. By doing so, the result is that the company owes no trust fund taxes for the post-petition time frame of December 10, 1980 through December 31, 1980. If the company owes no such trust fund taxes, neither does Mr. Olson, because his obligation is solely a function of the obligation of the company for such trust fund taxes.

The Court, therefore, finds that the claim of the United States against Mr. Olson for the amount of trust fund taxes allegedly due for payroll made between December 10, 1980, and December 31, 1980 is not allowed.

The United States has provided no evidence that payroll was actually made during the first ten days of December, 1980. This Court accepts as true the evidence presented by Mr. Olson that no

payroll was made during the first ten days of December, 1980, and that the quarterly report filed by the trustee after December 31, 1980, is incorrect. Therefore, that portion of the claim of the United States which assesses trust fund taxes based upon payroll allegedly paid during the first ten days of December, 1980, is found to be invalid and not allowed.

[9] The final question concerns the right of the Internal Revenue Service to apply the payments made by the company in July of 1980 to the company matching obligations rather than to the trust fund taxes for that period of the quarter. As legal authority for its application practice, the United States relies upon an Internal Revenue Service Manual which was not admitted into evidence. A copy

of such a manual is attached to the final argument and brief submitted by the united States.

The Internal Revenue Service recognizes the right of a taxpayer to designate the application of payments to specific tax obligations. However, when no designation is made, the Internal Revenue Service will almost always decide to apply the tax payment to a non-trust fund tax debt first. Revenue Ruling 79-284, 1979-2 C.B. 83, modifying Revenue Ruling 73-305, 1973-2 C.B. 43, superseding Revenue Ruling 58-239. 1958-1 C.B. 94, provides that

> voluntary partial payments of assessed tax, penalty, and interest will be applied to withheld employment taxes and collected excise taxes as designated by the taxpayer. If no designation is made, the payments will be allocated to tax, penalty and interest in a manner serving the best interest of the service.

Based upon this Revenue ruling

authority, the Internal Revenue Service manual provides a procedure for determining, in a step-by-step process, how much of the non-designated payment should be applied to trust fund taxes. The United States presented the testimony of two Internal Revenue Service employees explaining the process by which the July payments were applied to the non-trust fund taxes first for the third quarter.

In 1980, OBM did not designate the application of the payments that it made during July of 1980. Therefore, when the Internal Revenue Service was computing the amount of trust fund taxes still owed by OBM, it followed the Revenue ruling cited above and applied the July payments first to the non-trust fund portion of the tax obligations, leaving no money to be applied to the trust fund portion.

This procedure has been discussed in several cases concerning the right of a debtor in bankruptcy to allocate tax payments made pursuant to a bankruptcy plan of reorganization to trust fund versus non-trust fund taxes. Se In re DuCharmen & Co. 852 F, 2d 194 (6th Cir. 1988); In re Technical Knockout Graphics Co., Inc., 833 F. 2d 797 (9th Cir. 1987); In re Ribs-R-Us, Inc., 828 F. 2d 199 (3rd. Cir. 1987). These three cases ruled that a bankruptcy court could not confirm a plan which authorized the debtor to designate post-petition payments to be applied to certain types of taxes owed for other types of taxes. On the other hand, In re Energy Resources Co., Inc., 871 F. 2d 223 (1st Cir. 1989) decided that the bankruptcy court did not have the power to confirm a plan

providing for a designation of payments over the objection of the Internal Revenue Service.

However, each of those cases was dealing specifically with the attempt by a debtor in bankruptcy to override the Internal Revenue Service application policy concerning future payments. In the case before the Court, the Internal Revenue Service, dealing with a corporate debtor not in bankruptcy at the time the taxes became due, has applied payments previously made in a manner consistent with the Revenue Ruling. The company which actually owes the taxes is no longer in existence. It was not in existence in 1993 when the application was made. The party objecting to the application is the "responsible party" under the statute who will be subject to

a higher claim by the Internal Revenue Service if the court upholds the application policy than if the court finds the policy to be unwarranted.

After considering the right and obligation of the Internal Revenue Service to collect taxes and to implement procedures beneficial to that collection activity, this Court does not find the procedures followed in this case to be unwarranted or an unreasonable interpretation of its duties. The Internal Revenue Service will be unable to collect trust fund taxes or non-trust fund taxes from OBM. It has no statutory authority to "pierce the corporate veil" and collect the non-trust fund taxes from the responsible officer in the corporation. However, it does have a statutory opportunity to collect the

trust fund taxes from the responsible person.

In order to maximize its opportunity for collection of revenues, it has implemented a policy whereby payments made during a quarter are applied in a manner most beneficial to the United States. That means that it first applies payments to the non-trust fund aspects of the obligation of the company in order to maximize that collection process. It then looks to the responsible person for collection of the trust fund taxes. In this case, it looks to Theodore V. Olson for collection of those trust fund taxes which accrued during the quarter July 1 through September 30, 1980.

This procedure is not unreasonable and the application of the payments on a quarterly basis rather than on a weekly

basis in which they were paid is also not unreasonable. The evidence before the Court is that the weekly or monthly payments are simply deposited in a general account and are not applied to any particular portion of the tax obligation of the company until the quarterly report is filed or until it is determined that there is an inability to collect from the company all of the taxes due by the company.

The Court, therefore, concludes that the application by the Internal Revenue Service of payments made during July of 1980 first to non-trust fund taxes thereby maximizing the amount due from Mr. Olson for trust fund taxes is not unreasonable and the claim of the Internal Revenue Service with regard to such taxes is allowed.

For plan confirmation purposes and claim allowance purposes, the United States should file an amended claim with specific numbers in conformance with this opinion.

In conclusion, the Court finds that Prudential does not, Olson Lawyers do not, and the United States does not have a lien on the interpleaded fund. The IRS assessment against Theodore V. Olson during his 1982 bankruptcy case is void. The application of taxes paid by OBM after its bankruptcy to non-trust fund prepetition tax obligations is invalid. The application of OBM tax payments in July, 1980, to third quarter non-trust fund taxes is appropriate. The United States may file an amended claim in conformance with this memorandum.

Separate journal entry to be filed.

JOURNAL ENTRY

Before a United States Bankruptcy Judge for the District of Nebraska regarding numerous issues with regard to tax liabilities and lien priorities.

APPEARANCES

Robert Creager, Attorney, P.O. Box 4554, Lincoln, NE 68504

Frank Heinisch, Attorney, P.O. Box 311, Geneva, NE 68361

William Needler, Attorney, Box 177, 106 W. 1st Street, Ogallala, NE 69153

Loren Mark and Tom Carlucci, Tax Division, U.S. Department of Justice, P.O. Box 683, Ben Franklin Sta., Washington, D.C., 20044

Richard Anderl, Attorney, The Omaha Building. Omaha, Ne 68102

IT IS ORDERED:

The Court finds that Prudential does not, Olson Lawyers do not, and the United States does not have a lien on the interpleaded fund. The IRS assessment against Theodore V. Olson during his 1982 bankruptcy case is void. The application of taxes paid by OBM after its bankruptcy to non-trust fund prepetition tax obligations is invalid. The application of OBM tax payments in July, 1980, to third quarter non-trust fund taxes is appropriate. The United States may file

an amended claim in conformance with this order. See memorandum of this date.

DATED: May 26, 1989.

BY THE COURT:

Timothy J. Mahoney
Chief Judge

EXCERPT

THEODORE V. OLSON AGREEMENT ON LEGAL FEES

* * * * * *

Theodore V. Olson acknowledges that under Section 7-108 R.R.S. 1943 of the Nebraska statutes that the law firms have a right to an attorney's lien for the general balance of compensation for legal services upon money in the hands of adverse parties that is part of the reorganization efforts for which the law firms have been employed. Theodore V. Olson consents to and affirms notifying the following parties holding his property and money of the statutory lien for legal services:

First National Bank of Atkinson
Atkinson Nebraska 68713

Norwest Capital Management & Trust Company
20th & Farnam Streets
Omaha, Nebraska 68103

Overland National Bank
304 West Third Street
Grand Island, Nebraska 68801

First National Bank
O'Neill Nebraska 68736

Farmers Cooperative Association of Dallas
Dallas, South Dakota 57529

Theodore V. Olson agrees that the balance due Heinisch & Bryant Law Office as of January 31, 1984 for representation in the sum of $12,000.00 by its promisory note of February 1, 1982 and $65,147.50 for the reorganization plus disbursements advanced in the amount of $3,106.10 an agregate of $68,253.60 and agrees that such fees are fair and reasonable.

* * * * * *

Theodore V. Olson agrees that the balance due William L. Needler & Associates, Ltd. as of January 31, 1984 for representation in the reorganization is $249,674.55 plus disbursements

advanced in the amount of 13,422.18 an aggregate of $263,096 and agrees that such fees are fair and reasonable.

* * * * * *

Dated March 16,1984

/s/Theodore V. Olson